Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

SANDRA M. WENZEL, *Petitioner*,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *Respondent*,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Sandra M. Wenzel
624 Marana Drive
Carmel, IN 46032
Petitioner, *Pro Se*

QUESTIONS PRESENTED

1. Whether the court of appeals misinterpreted the burden of proof required in a Title VII retaliation claim.

2. Whether the court of appeals erred when its basis for denying a Title VII retaliation claim was not based on fact.

3. Whether anti-*Pro Se* sentiment in the lower courts inverted the burden of proof required of a nonmovant in a motion for summary judgment.

4. Whether the lower courts violated the Seventh Amendment of the United States Constitution by granting summary judgment.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

SANDRA M. WENZEL, *Petitioner*,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION, *Respondent*,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Sandra M. Wenzel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is an unpublished order (App., *infra*, 1a-4a). The opinion of the district court is an entry of judgment (App., *infra*, 5a) with an entry on defendant's motion for summary judgment (App., *infra*, 11a-46a).

JURISDICTION

The court of appeals entered its judgment on April 27, 1999 (App., *infra*, 1a-4a) and denied the petition for rehearing with suggestion for rehearing *en banc* on May 26, 1999 (App., *infra*, 6a-7a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISION INVOLVED

This case was brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq*., and the Age Discrimination in Employment Act, as amended, 29 U.S.C. Section 621 *et esq*. (App., *infra*, 109a-110a)

28 U.S.C. Section 1654

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

CONSTITUTIONAL PROVISION INVOLVED

Seventh Amendment

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT

Petitioner, Sandra M. Wenzel ("Wenzel") filed a complaint (App., *infra*, 108a-129a) against respondent, International Business Machines Corporation ("IBM") in the district court on November 25, 1996, after issuance of a Notice of Right to Sue by the Equal Employment Opportunity Commission "EEOC"(App , *infra*, 110a).

This case was brought to remedy discrimination on the basis of sex and age in the terms, conditions and privileges of employment and to remedy retaliation against an employee for activity protected under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e

et seq., and of the Age Discrimination in Employment Act as amended, 29 U.S.C. Section 621 *et seq.* (App., *infra*, 109a-110a)

The statutory right to proceed *Pro Se* (28 U.S.C. Section 1654) is being exercised by petitioner in this case.

Injunctive and declaratory relief, damages and other appropriate legal and equitable relief were sought pursuant to 42 U.S.C. Section 2000-5(f) and (g) and 29 U.S.C. Section 626(b). Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, petitioner demanded a trial by jury in the initial complaint (App., *infra*, 128a).

Trial by jury was denied when the district court ruled in favor of respondent's motion for summary judgment (App., *infra*, 5a). The court of appeals affirmed the district court's ruling (App., *infra*, 1a-4a) and denied a petition by petitioner for rehearing with suggestion for rehearing *en banc* (App., *infra*, 6a-7a).

A. Statement of Facts

Wenzel was hired as a Systems Engineer in Information Systems Services, Indianapolis, IN, on or about April 9, 1984, and worked on local, national, and international contracts.

While working on a federal government contract at Ft. Benjamin Harrison ("Ft. Ben"), Wenzel experienced harassment in 1988 and 1989 from three (3) male peers - Brian Stone ("Stone"), Ron Moore ("Moore"), and Ellis Holman ("Holman"). Wenzel reported the ill treatment and "hostile environment" to management, documented it in a memo, and the actions were abated for a period of time until Wenzel got a new manager, Tom Boehrer ("Boehrer").

In 1992 Wenzel's manager, Phil Canada ("Canada") negotiated a contract for Wenzel at the City of Indianapolis & Marion County ("City-County") when the client specifically requested that Wenzel work on the contract. After Canada left the company, Wenzel 's team was moved

to Consulting Services Networking and Wenzel reported to the same manager, Carolyn Perry ("Perry"), as Stone. When peers reported derogatory remarks made about Wenzel by Stone and Stone interfered with the contract by making comments to the client about Canada and Wenzel, Wenzel reported it to Jeff Artis ("Artis"), Manager of Product Marketing and Technical Support. Wenzel told Artis she was leery about being assigned to Consulting Services and working with Stone, one of the same males who had harassed her. Wenzel wanted Artis to be aware because she did not believe that Perry would protect her if Stone continued to interfere with the contract and Wenzel has always felt that, at some point IBM management would try to take some form of retaliatory action against her, as had been done to others in similar situations. Later, Wenzel reported Stone's remarks and behavior to Perry. Shortly thereafter, Perry informed Wenzel on May 11, 1992, that she was on the surplus list. When an

announcement was made on May 14, 1992 by Mike Wiley ("Wiley"), General Manager of Indiana, that Downall (the same manager who allowed the harassment in 1988 and 1989), was being assigned as the new Manager of Consulting Services, Wenzel filed with the EEOC on May 15, 1992.

On or about May, 1993, Wenzel was contacted by David Tite ("Tite"), EEOC investigator, to sign off on her EEOC charge. Wenzel was led to believe that she had to do so, per the EEOC director, because the charge had been open for a year. Wenzel voiced to Tite on more than one occasion her fear of retaliation once the charge was closed because IBM management could not have treated her any nicer during the time the charge had been waiting for investigation. Tite did not feel that anyone at IBM would bother Wenzel again but he told Wenzel to contact Drew Terry ("Terry"), IBM attorney, should anything happen again.

It was not long before Wenzel detected a marked change in manner and attitude towards her by some of management.

Later, Wenzel contacted Terry, attorney, via e-mail (PROFs) on September 15, 1993, and he put her in touch with first Bill Noah ("Noah"), Human Resource Advisor, and then Steve Kelley ("Kelley"), IBM attorney. But, no real investigation was done.

When Wenzel met with Wiley, now Area 5 Vice President, in December, 1993, she voiced her concerns about retaliation for filing with the EEOC and the "hostile environment" since she had signed off on the EEOC charge.

During this time Wenzel also voiced her concerns to IBM management about, including but not limited to, attempts to remove her from successful client environments, assignments for which Wenzel was qualified being given to men, existing responsibilities being removed

and given to men, and lack of local contract opportunities. During this time Wenzel was also seeking resolution via the Open Door process without success.

On May 16, 1994, two (2) years and one (1) day since the filing of Wenzel's EEOC charge, Landry contacted Wenzel via pager while she was working on a critical contract situation and demanded that Wenzel come to the office, also stating that Landry would consider Wenzel's behavior insubordinate if she was not there at a specified time. Wenzel's attempts to reach Landry via phone to explain the client's situation and that the client's location on the northeast side prevented Wenzel from meeting Landry in the office at the demanded time went unheeded for a long time. Finally, Landry responded and another time was scheduled. Prior to the meeting with Landry, Wenzel sent a PROFs note to Walker (now Gail Walker Jarrett), requesting a different manager. That request was later denied so Wenzel repeated the request and that, if denied,

to send Wenzel a Request for Transfer (RFT) form; the request was refused and the RFT form was never sent by Walker. When Wenzel met with Landry on May 20, 1994, Landry presented her with a Condition of Employment letter but refused to tell Wenzel the reason for the letter. Landry told Wenzel no one wanted to work with her. When Wenzel asked Landry who were her accusers, what were their names, Landry told her nothing. When Landry demanded that Wenzel sign the letter, Wenzel told Landry she could not sign the letter without seeking legal counsel. Wenzel was shocked when Landry mentioned severance pay and inquired as to what had she done that was so terrible. Wenzel did seek legal counsel and the letter was never signed. Wenzel later learned of the availability of the Retirement Bridge Leave of Absence and that Wenzel would become eligible on her 50th birthday in January, 1995. Wenzel felt the letter was a pretext to deny her this retirement benefit.

Wenzel continued to seek protection from Landry and Walker via the Open Door process but her pleas went unheeded. Wenzel sought protection from any further damage by requesting a witness be present at any meeting with them but her repeated requests continued to be refused. Wenzel requested assistance from Kelley but he did nothing. Wenzel's correspondence with Kelly indicates that Wenzel had not refused to meet but there were extenuating circumstances. Kelly was told by Wenzel of her upcoming surgery.

Wenzel had even appealed her Open Door to Louis V. Gerstner, Jr. ("Gerstner"), IBM Chairman of the Board and Chief Executive Officer, and stated the additional concern of age discrimination that needed to be investigated. Just prior to Wenzel's termination, Wenzel had talked again with Al Wells ("Wells") in Gerstner's office. Wells was made aware of Wenzel's upcoming surgery. On the day after her termination Wenzel sent a letter to Gerstner via

fax but the termination was not rescinded (App., *infra*, 114a-127a).

B. Proceedings Below

The district court entered a summary judgment ruling on July 21, 1998 (App., *infra*, 5a), dismissing all pending claims and denying all relief. The court of appeals affirmed the district court's decision on April 27, 1999 (App., *infra*, 1a-4a), and denied a petition for rehearing with suggestion for rehearing *en banc* on May 26, 1999 (App., *infra*, 6a-7a).

A motion for stay of mandate was denied by the court of appeals on June 4, 1999 (App., *infra*, 8a). The order lifting the stay that had been issued in the district court on October 26, 1998, was issued by the district court on June 9, 1999 (App., *infra*, 9a-10a).

All requests for hearings and oral argument were denied in the lower courts.

REASONS FOR GRANTING THE PETITION

The lower court rulings should not stand unreviewed by the Supreme Court.

I. The court of appeals misinterpreted the burden of proof required in a Title VII retaliation claim.

The court of appeals' interpretation of the burden of proof required in a Title VII retaliation claim conflicts with other rulings in the Seventh Circuit as well as other circuits.

A *prima facie* case of retaliation under 42 U.S.C. Section 2000e–3(a) must establish proof that the adverse action was causally related to the protected expression. In order to establish the causal relation element, Wenzel only needed to show that the protected activity and the adverse action were not wholly unrelated.

The court of appeals stated in its unpublished order (App., *infra*, 2a-3a) that Wenzel's argument of adverse actions against her not being "wholly unrelated" was without merit, refuting *Simmons v. Camden County Bd. Of Educ.*, 757 F.2d 1187, 1189 (11th Cir. 1985), yet this

argument was upheld in other decisions of the Court (*Holland v. Jefferson Nat. Life Ins. Co.*, 883 F.2d 1307 (7th Cir. 1989); *Hunt-Golliday v. Metropolitan Water Reclamation District of Greater Chicago*, 104 F.3d 1004 (7th Cir. 1997)) as well as other appellate courts (*E.E.O. C. v. Avery Dennison Corp.*, 104 F.3d 858 (6th Cir. 1997); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515 (11th Cir. 1991).

Subsequent to this complaint being filed in the district court in 1996, the Court has provided guidance to the lower courts on Title VII claims in *Burlington Industries, Inc. v. Ellerth*, 1998 WL 336326 (U.S.Ill.) and *Faragher v. City of Boca Raton*, 1998 WL 336322 (U.S.), but further guidance is needed.

The lower courts are divided on this issue. A ruling by this Court must be made to resolve the conflict among the lower courts by providing uniformity among the lower

courts as to the burden of proof required in a Title VII retaliation claim.

II. The court of appeals erred when its basis for denying a Title VII retaliation claim was not based on fact.

The court of appeals' basis for denying the claim was that Wenzel did not refute the affidavit testimony of Wenzel's Professional Development Manager.

Not only did the court of appeals misconstrue or overlook the fact that Wenzel did, indeed, refute the affidavit testimony of her Professional Development Manager but the court of appeals did not accurately state the wording of that affidavit.

The court of appeals stated in the unpublished order (App., *infra*, 1a-4a) that "Wenzel did not refute the affidavit testimony of her Professional Development Manager that she was terminated for refusing to meet with supervisors to discuss a customer complaint that she had

threatened one of its employees." (App., *infra*, 3a) But, that affidavit only stated "our requests for a meeting" without giving a reason, which the court of appeals infers. Moreover, not only did Wenzel refute that testimony under the heading, "IBM Has Not Articulated A Legitimate Business Reason for Plaintiff's Termination," (App., *infra*, 68a-81a) in Plaintiff's Answer Brief in Opposition to Defendant International Business Machines Corporation's Motion for Summary Judgment (App., *infra*, 47a-107a) and appellant's reply brief, but Wenzel provided further elaboration on inaccuracies.

The ruling by the court of appeals needs to be reviewed by this Court because the basis the court of appeals' ruling is erroneous. A review by this Court is of significant importance to the lower courts in order to provide uniformity in rulings not only for Title VII retaliation claims but for all Title VII claims.

III. Anti-*Pro Se* sentiment existed in the lower courts to invert the burden of proof required of a nonmovant in a motion for summary judgment.

Instead of viewing the facts in the light most favorable to Wenzel, nonmovant in a motion for summary judgment, the lower courts viewed the facts in the light most favorable to IBM, ruling in favor of IBM's motion for summary judgment. Where there were discrepancies in the factual record, IBM's version was believed.

During the discovery process Wenzel brought to the attention of the district court that she, a *Pro Se* litigant, felt greatly disadvantaged by the district court. The magistrate judge made her feelings about Wenzel's status as a *Pro Se* quite clear. On district court responses the magistrate judge apprised Wenzel of IBM's rights as if Wenzel had none, often citing legal arguments in addition to what IBM had or had not cited. Thus far in this case Wenzel has been able to identify at least eight (8) IBM attorneys and one (1) IBM

legal assistant, and at least four (4) attorneys and one (1) legal assistant of Barnes & Thornburg, counsel for IBM. With this plethora of legal resources as well as limitless financial resources, Wenzel could not help but feel disadvantaged when the magistrate judge often sounded like another legal representative acting on IBM's behalf.

No requests for hearings or oral argument were granted by the lower courts. After one request for a hearing with the district judge was denied, the attorneys for Barnes & Thornburg were able to set up a discussion with the magistrate judge via telephone in less than an hour. Wenzel's request for the discussion to be on the record was denied by the magistrate judge.

Of exceptional importance to Wenzel's petition is that the court of appeals did not explain with much depth in the unpublished order (App., *infra*, 1a-4a) how it had reached its conclusions, leaving Wenzel unable to respond adequately.

Inferences were made by the court of appeals and conclusions were drawn by the court of appeals in reaching its decision but without that knowledge Wenzel is unable to state in each and every instance whether or not the court of appeals' decision conflicts with other decisions or applies the same standard in reviewing *Pro Se* claims.

Just as the courts of appeals stated that "...the pro se litigant..., we cannot peer into a litigant's mind,..." (*Munson v. Friske*, 754 F.2d 683, 698 n. 10 (7th Cir. 1985)), Wenzel, likewise, cannot peer into the mind of the court of appeals, and should not be held to a higher standard.

McPherson v. Coombe, 1999 WL 235771 (2nd Cir.(N.Y.)) stated that "we read the pleading of a pro se plaintiff liberally and interpret them 'to raise the strongest arguments that they suggest.' *Burgos v. Hopkins*, 14 F.3d 787, 790 (2nd Cir. 1994)" and *Holly v. Department of Veteran Affairs*, 165 F.3d 244 (3rd Cir. 1999) stated "We

apply the applicable law, irrespective of whether a pro se litigant has mentioned it by name. See *Small v. Lehman*, 98 F.3d 762, 766 (3d Cir. 1996); *Lewis v. Attorney General of United States*, 878 F.2d 714, 722 n. 20 (3d Cir. 1989)."

In the Matter of Kindhart, 160 F.3d 1171 (7th Cir. 1998), the court of appeals stated "There are occasional pro se appearances in this court, and that is what we have here, but with a difference. Vicki A. Dempsey appears pro se, but without the usual pro se handicaps as she is an attorney." While the court of appeals has acknowledged that the *Pro Se* litigant faces handicaps and has further stated in numerous cases that the pleadings of a *Pro Se* litigant are to be construed more liberally, specifically *Gutierrez v. Peters*, 111 F.3d 1364 (7th Cir. 1997), and has stated that the "inartful pleading of a pro se litigant, however, is not to be read with such technical formality" (*Harris v. Fleming*, 839 F.2d 1232 (7th Cir. 1988), the

court of appeals, nevertheless, appears to profile the *Pro Se* adversely.

In Verdone v. Cir. Cit. for Taylor Cy., 73 F.3d 669 (7th Cir. 1995), the court of appeals stated that "Frivolous, vexatious, and repeated filings by pro se litigants interfere with the orderly administration of justice by diverting scarce judicial resources from cases having merit and filed by litigants willing to follow court orders. The Supreme Court has noted: Every paper...." (*In re McDonald*, 489 U.S. 180, 184 (1989)). However, it bears noting that the court of appeals failed to make the distinction that the Supreme Court had preceded those remarks being quoted with "But, paupers filing pro se petitions are not subject to the financial considerations – filing fees and attorney's fees – that deter other litigants from filing frivolous petitions. Every paper ...."

While the court of appeals would lump together all litigants as persons without valid claims who "bother" the

court, anti-*Pro Se* sentiment can only harm, both legally and procedurally, litigants who proceed *Pro Se* for other reasons.

In the court of appeals' instructions on type requirements for briefs and other papers reference is made to the requirement set forth in 7th Cir.R. 31(e) to file a copy of the brief on digital media with the court and any other party separately represented by counsel. The instructions state, however, that only counsel needs to be served, and that it is not necessary to serve disks on litigants proceeding *pro se* who likely lack the equipment needed to use the disks. While this concession might seem insignificant at first glance it does seem to adversely profile the *Pro Se* litigant and further handicap the *Pro Se* litigant who does have the equipment. While appearing to be well intentioned, these instructions seem to be an unnecessary concession to attorneys in that the cost of a disk is minimal and the time copying the file to disk is minimal.

Just as the rights of incarcerated *Pro Se* litigants and indigent *Pro Se* litigants have been addressed by this Court, the rights of other *Pro Se* litigants need to be addressed so that all *Pro Se* litigants experience the same rights to justice in the lower courts as persons represented by counsel.

A ruling by this Court is needed to more clearly define the burden of proof required to refute a motion for summary judgment as it pertains to *Pro Se* litigants in civil suits, clarifying the Court's position to the lower courts and dispelling conflicting lower court decisions where anti-*Pro Se* sentiment exists.

IV. The lower courts violated the Seventh Amendment of the United States Constitution by granting summary judgment.

The right to a trial by jury is guaranteed in the Seventh Amendment of the United States Constitution. Wenzel exercised that right by making a demand for trial by jury in the initial complaint (App., *infra*, 128a).

Issues of fact are to be determined by a jury and no ruling for summary judgment should be made if genuine issues of material fact exist. Wenzel, nonmovant in the motion for summary judgment, substantiated the existence of issues of material fact but IBM was believed even though Wenzel's accounting of the facts should have been believed. Other issues of material fact existed, including but not limited to, the credibility of witnesses (App., *infra*, 93a-101a) and physical evidence that needed to be evaluated by a jury (App., *infra*, 101a-102a).

Further, Wenzel was denied evidentiary material requested from IBM during the discovery process (App., *infra*, 102a-103a), even though Wenzel's appeal is a Title VII claim and limitations on discovery are especially frowned upon in Title VII claims (*Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983). While the court of appeals claimed that Wenzel did not present evidence to prove her claims, the court of appeals was silent on issues

addressed in Wenzel's appeal as to abuse of discretion by the district court.

Throughout this case Wenzel has maintained that the information to prove her case can be found in documents and information in IBM's possession if that documentation has not been destroyed. Wenzel sought diligently via the district court to gain documents related to her claims but IBM failed to provide full and complete discovery, and IBM was not compelled to do so. While Wenzel was ordered to submit all documents to IBM, the district court did not order IBM to do the same.

Even though Wenzel had appealed to Louis V. Gerstner, Jr., Chairman of the Board and Chief Executive Officer, via IBM's Open Door process (App., *infra*, 48a, 92a-93a, 126a-127a), Wenzel's request to take Gerstner's deposition was denied by IBM and upheld by the district court (App., *infra*, 83a-84a).

By not compelling IBM to provide full and complete discovery in order for Wenzel to substantiate to the courts' satisfaction her claims in opposition to a motion for summary judgment, the lower courts effectively blocked Wenzel's right to a trial by jury.

A ruling by this Court as to what constitutes a violation of the Seventh Amendment in its application to *Pro Se* litigants in civil suits is vital, else Seventh Amendment rights are denied to those *Pro Se* litigants through legal procedures that serve as insurmountable obstacles on the path to justice.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Sandra M. Wenzel
624 Marana Drive
Carmel, IN 46032
Petitioner, *Pro Se*

APPENDIX A

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 22, 1999*
Decided April 27, 1999

Before:
Hon. RICHARD A. POSNER, *Chief Judge,*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

No. 98-2907

Appeal from the United States District Court
for the Southern District

SANDRA M. WENZEL, *Plaintiff-Appellant,*
V,
INTERNATIONAL BUSINESS MACHINES
CORPORATION, *Defendant-Appellee*

No. IP 96-1704-C (M/S)
Larry J. McKinney, *Judge*

O R D E R

Sandra Wenzel brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 20OOe-2 to 20OOe-17, and the Age Discrimination in Employment

Act, 29 U.S.C. §§ 621-34, alleging that her employer, International Business Machines Corporation (IBM), unfairly appraised her performance and ultimately discharged her based on her sex and age and in retaliation for her efforts to seek relief from the alleged discrimination. The district court granted summary judgment for the defendant, holding that Wenzel failed to establish a genuine issue of triable fact is to whether the defendant's articulated reason for its actions--insubordination--was pretextual. Because the district court adequately addressed Wenzel's contentions, we affirm for substantially the reasons given in its comprehensive opinion. A single issue merits additional comment.

The only one of Wenzel's contentions that we need address involves her claim of retaliation. She appears to argue that, under *Simmons v. Camden County Bd. Of Educ.*, 757 F.2d 1187, 1189 (I I th Cir. 1985). she was required to show only that the adverse actions of termination and unfair

evaluation were not "wholly unrelated" to her 1992 EEOC filing and pursuit of relief through IBM's internal grievance procedures. This argument is without merit. An affirmative causal link between adverse employment action and protected activity will not be presumed, but "must be proved in its own right." *Hamann v. Gates Chevrolet*, 910 F.2d 1417, 1420 (7th Cir. 1990)-, see also *Jasmantas v. Subaru-Isuzu Automotive, Inc.*, 13 9 F. 3 d I 1 5 5, 115 7 (7th Cir. 19,98). And Wenzel cannot point to any competent evidence linking her termination or evaluation to any protected activity. Wenzel did not refute the affidavit testimony of her Professional Development Manager that she was terminated for refusing to meet with superiors to discuss a customer complaint that she had threatened one of its employees. Consequently, the district court properly entered summary judgment for IBM on Wenzel's retaliation claim.

AFFIRMED.

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. See Fed. R. App. P. 34(a)

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

CAUSE NO. IP 96-1704-C M/S

SANDRA M. WENZEL, Plaintiff,
V.
INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.

ENTRY OF JUDGMENT

Through an order issued on this date, this Court has granted summary judgment in favor of the defendant, International Business Machines Corporation, and against the plaintiff, Sandra M. Wenzel. A final judgment is entered accordingly. Plaintiff shall take nothing by way of her complaint. This cause is DISMISSED WITH PREJUDICE.

DATED this 21st day of July, 1998.

/S/ Laura A. Briggs
LAURA A. BRIGGS, ACTING CLERK
United States District Court
Southern District of Indiana

By: /S/ Sally DeLong
Deputy Clerk

APPENDIX C

United States Court of Appeals
For the Seventh Circuit Chicago, Illinois 60604
May 26, 1999

Before:
Hon. Richard A. Posner, Chief judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Michael S. Kanne, Circuit judge

SANDRA M. WENZEL, Plaintiff-Appellant
v.
INTERNATONAL BUSINESS MACHINES CORPORATION, Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Larry J. McKinney, *Judge.*
No. IP 96-1704-C(M/S)
No. 98-2907

ORDER

On May 11, 1999, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges* has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

*Hon. Kenneth F. Ripple did not participate in the consideration of the petition.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 4, 1999

By the Court:

No. 98-2907

SANDRA M. WENZEL, Plaintiff-Appellant,
v.
INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant-Appellee

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 96 C 1704 C (M/S)

Larry J. McKinney, Judge.

Upon consideration of the MOTION FOR STAY OF

MANDATE, filed on June 1, 1999, by the pro se appellant,

IT IS ORDERED that the motion is DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SANDRA M. WENZEL, Plaintiff,
V.
INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.

CAUSE NO. IP 96-1704-C M/S

ORDER LIFTING STAY

The Seventh Circuit Court of Appeals having affirmed the judgment of this Court, the stay is now lifted and costs in the amount of $13,929.75 are now due pursuant to the Order of this Court issued October 26, 1998.

IT IS SO ORDERED this 9th day of June, 1999.

/S/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

Distribution to:

Sandra M. Wenzel
624 Marana Drive
Carmel, IN 46032

Michael A. Moffatt
Susan M. Zoeller
BARNES &THORNBURG
1313 Merchants Bank Building 11 South Meridian Street
Indianapolis, IN 46204

APPENDIX F

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SANDRA M. WENZEL, Plaintiff.
V.
INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant

CAUSE NO. IP 96-1704-C (M/S)

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case is before the Court on defendant International Business Machines Corporation's ("IBM") motion for summary judgment on plaintiff Sandra M. Wenzel's claims of discrimination based on age and gender and her claim of retaliation for filing charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") and utilizing IBM's Open Door Program to complain of discrimination. Wenzel's claims are brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII"), and the Age

Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"). The motion is fully briefed, and the Court, being fully advised, now finds that summary judgment should be entered in favor of IBM on each of Wenzel's claims. Therefore, as further explained below, IBM's motion for summary judgment is GRANTED in its entirety.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides that summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." All reasonable inferences must be resolved in favor of the nonmoving party; however, the nomnovant "'may not simply rest on his pleadings, but must demonstrate by specific evidence that there is a genuine issue of triable

fact.'" Colip v. Clare, 26 F.3d 712, 714 (7th Cir. 1994) (quoting Swanson v. Village of Lake in the Hills, 962 F.2d 602, 603-04 (7th Cir. 1992)). This burden cannot be met with conclusory statements or speculation, see Weihaupt N,. American Med. Ass'n, 874 F.2d 419, 428 (7th Cir. 1989), but only with appropriate citations to relevant admissible evidence. See Local Rule 56. 1; Waldridge v. American Hoechst Cor , 24 F.3d 918, 923-24 (7th Cir 1994).

The Seventh Circuit has noted that summary judgment is "infrequently an appropriate resolution" of a Title VII case because such cases often turn on issues of motive or intent. Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1312 (7th Cir. 1989) (citing Powers v. Dole, 782 F.2d 689, 694 (7th Cir. 1986)). However, even when discriminatory intent is at issue, summary judgment is appropriate when the nonmovant presents no evidence to indicate motive or intent in support of her position. See

Holland, 883 F.2d at 1312. Further, the nonmovant will not defeat summary judgment merely by pointing to self-serving allegations without evidentiary support. Cliff v. Board of School Comm'rs, 42 F.3d 403, 408 (7th Cir. 1994).

When supporting a motion for summary judgment a party shall include a "Statement of Material Facts" it contends are not genuinely disputed. Local Rule 56. 1. The movant must support its statement with appropriate citations to evidentiary materials. Id. The nonnovant is required to file a brief and any evidentiary materials controverting the movant's position. Id. The opposing nomovant must also include a "Statement of Genuine Issues" supported by appropriate citations to evidentiary materials. 1-d. Failure of the nonmovant to comply with these requirements will allow "the Court [to] assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without

controversy." Id. Summary judgment, if proper, will then be entered in favor of the movant.

Because IBM seeks the entry of summary judgment against Wenzel, who is proceeding pro se in this matter, IBM provided Wenzel with the notice required by Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982). This notice set forth Wenzel's obligations under Federal Rule of Civil Procedure 56 and Local Rule 56.1, and specifically informed Wenzel that in order to avoid entry of summary judgment in IBM's favor she "must come forward with admissible evidence to raise a factual issue for trial." Because Wenzel is a pro se litigant, this Court will read her summary judgment response more generously than it would if she were represented by counsel, see Vance v. Peters, 97 F.3d 987, 993 (7th Cir. 1996), cert. denied, II 7 S.Ct. 1822 (1997); however, pro se litigants "are not entitled to a general dispensation from the rules of procedure," Jones v. Phipps, 39 F.3d 158, 163 (7th Cir. 1994). and Wenzel must

still satisfy her burden of presenting evidence that a disputed issue of material fact exists in order to avoid summary judgment.

That said, the Court notes that Wenzel has submitted voluminous documents in opposition to IBM's motion, most of which are not authenticated and therefore would not ordinarily be considered as evidence in opposition to a motion for summary judgment, as they do not constitute admissible evidence. However, because it does not affect the outcome of the Court's ruling, the Court has considered Wenzel's documents as if they had been submitted with proper authentication. The Court has not combed through all of the exhibits submitted by Wenzel in search of evidence which may support her claim, but has reviewed only those exhibits to which she cites in her answer brief. See Johnston v. Amax Coal Co., 963 F. Supp. 758, 762 (S.D. Ind. 1997) ("It is not the duty of the district court to scour the record in search of evidence to defeat a motion

for summary judgment; rather, the nonoving party bears the responsibility of identifying the evidence upon which [she] relies.").

FACTUAL BACKGROUND

The material facts of record taken in the light most favorable to Wenzel are as follow. Wenzel was employed by IBM from April 1984 until her termination on October 13, 1994. At the time of her termination, Wenzel was working as an I/T Specialist assigned to IBM's Product Marketing and Technical Support Organization and was responsible for providing on-location technical services to IBM customers. Pursuant to IBM's resource deployment model, "Move right skill to right opportunity," I/T Specialists were assigned by IBM to certain customers based upon their skills and their availability.

In May 1992, Wenzel filed an EEOC charge against IBM alleging that she had been chosen for IBM's "surplus list" during its downsizing program because of her gender

and in retaliation for using IBM's Open Door Program to complain of sexual harassment several years earlier. In June 1992, Wenzel was informed that she had been removed from the surplus list because several employees had voluntarily accepted an enhanced separation package, eliminating the need to separate other employees. Wenzel also received a salary increase, and her team was assigned to work under a new manager, from whom Wenzel received a very good performance evaluation.

In May 1993, Wenzel was contacted by an EEOC investigator regarding her charge, which had been open for approximately a year. Wenzel withdrew the charge, believing that the EEOC director wanted it closed, even though she feared that IBM's congenial attitude toward her, which had ensued after she filed her charge, would change once the charge was withdrawn.

On or about April 27,1994, Wenzel met with Michael Heneghan, who had been her Professional Development

Manager from January 1993 to March 1, 1994, [FN1] to discuss her performance appraisal. Wenzel's overall performance rating was a "2," which Wenzel agrees was a good rating. However, Wenzel took exception to three comments on her appraisal form: (1) that her billable hours were very low, [FN2] which Wenzel believed was Heneghan's fault for not securing contracts for her which would provide her with billable opportunities; (2) that she had "a poor opinion and attitude about contracted employees" and was "very critical of their role in IBM, and [did] not respect their opinions or suggestions," which Wenzel felt was untrue; and (3) that while the overall satisfaction of Wenzel's customers was very high, one customer was dissatisfied with the level of skill she had provided. Wenzel believed that Heneghan should not have included these negative comments in her performance evaluation without first discussing them with her, and demanded to know which customer had been dissatisfied

with her service and what specific examples Heneghan had of her exhibiting a poor attitude toward contract employees. Heneghan told Wenzel that a representative of Arvin Industries, one of her customers, had complained to IBM Marketing Specialist Judy Battista that Wenzel had had to refer to a manual to answer simple questions. Heneghan also told Wenzel that her Team's Business Leader, Steven Ramos, had reported to Heiieghan that Wenzel had acted unprofessionally toward Bob Shimp, a contract employee, during a business meeting.

Wenzel left the meeting with Heneghan without signing her performance appraisal, informing Heneghan that she would be "following up" on the matter. Wenzel believed that because she was pursuing the matter through IBM's Open Door Program, [FN3] there was no need for her to discuss it further with Heneghan.

Later that day, Wenzel telephoned Steven Ramos to voice her concern over the fact that he had told Heneghan

about her outburst toward Bob Shimp. Wenzel told Ramos that she felt he was "out to get her."

Also later that day, Wenzel called Judy Battista to discuss the fact that Battista had reported to Heneghan regarding Wenzel's performance at Arvin Industries. Following this conversation, Battista reported to Heneghan and Gail Jarrett, Wenzel's second-line manager, that Wenzel had called and threatened her, making statements such as "I know where you live," [FN4] and that Battista had been frightened by the conversation.

Wenzel also spoke by telephone with Marcy Bradley at Arvin Industries later that day to discuss Bradley's complaints about her performance. On or about May 12, 1994, Bradley reported this conversation to Battista, who in turn reported to Heneghan. Heneghan spoke with Bradley, who said that Wenzel's call had been threatening and harassing and that Wenzel had accused Bradley of damaging her career. Bradley asked that Heneghan not tell

Wenzel of their conversation, as she feared for her personal safety. Heneghan reported this information to Jarrett.

Jarrett discussed Wenzel's conduct with Lisa Landry, Wenzel's Professional Development Manager. Jarrett and Landry consulted with IBM's Personnel Organization and determined that Wenzel's actions constituted a terminable offense, but decided to reprimand her rather than terminate her. Landry issued a condition of employment letter to Wenzel on May 20, 1994, which indicated that she would be terminated if she continued disrupting the work environment. According to Wenzel, Landry told Wenzel that she could either sign the letter and have it remain in her personnel file for three years, or leave IBM immediately and accept a severance pay package. Wenzel refused to sign the letter without first seeking legal counsel, and subsequently filed an open door complaint regarding the letter and the fact that Landry had threatened her job. Because of her pending open door complaint, Wenzel

refused to meet with Landry to discuss the matter further, despite Landry's numerous attempts to schedule a meeting with Wenzel.

Believing that Landry was not acting in her best interests, on May 20, 1994, Wenzel asked Jarrett to assign her a new Personal Development Manager. Jarrett, after seeking the input of IBM's Personnel Organization, denied the request. On June 6, 1994, Wenzel again requested a new manager, stating in an e-mail to Jarrett that she "never realized how damaging it can be for a white woman to have a black woman in a position of power over her who seems determined to rain her." Jarrett again denied Wenzel's request, and admonished her that "General comments about a specific ethnic group such as you mentioned in your note is inappropriate, and not in keeping with IBM's commitment to equal opportunity in the workplace."

Between May 20, 1994, and September 12, 1994, IBM management made the following efforts to convince

Wenzel to meet with Landry to discuss her performance appraisal (which Wenzel had refused to sign) and her condition of employment letter (which Wenzel had also refused to sign) and to discuss her performance plan and her need for a new development plan:

1) Landry left Wenzel numerous voice mail messages between May 20, 1994, and June 1, 1994, asking her to schedule a meeting. Wenzel did not respond.

2) On June 1, 1994, Landry sent Wenzel an e-mail instructing her to check both of their calendars and schedule a meeting to review her performance plan and prepare a new development plan. Wenzel responded that "I am seeking a resolution on these topics via my Open Door issue so there really is no need for any meeting at this time."

3) On June 8,1994, Al Wells, Project Administrator of IBM's Open Door Program, sent Wenzel an e-mail instructing her that the fact that an open door complaint was pending did not excuse her from working with her managers and that she should continue communicating with them.

4) On August 15, 1994, Robert LaBant, General Manager of IBM NorthAmerica, sent Wenzel a letter informing her that the investigation of her open door complaint had been completed and that the investigator had concluded, and LaBant concurred, that Wenzel's performance appraisal and the condition of employment

letter had both been fair and appropriate. LaBant urged Wenzel to work with Landry and Jarrett to discuss the condition of employment letter and produce a new development plan.

5) On August 22, 1994, Wenzel received an e-mail message from Jarrett which stated that the open door investigator had asked Jarrett to meet with Wenzel to discuss her development plan and asked Wenzel to contact Jarrett's secretary to schedule a meeting. Wenzel failed to respond to this message until September 10, 1994, when she e-mailed Jarrett to state that, on the advice of her attorney, she wanted a disinterested third party to attend any meetings that she had. Wenzel also suggested that another IBM manager, Terry Schackow, could act as the third party or could work with Wenzel on her development plan rather than Landry.

6) On September 9, 1994, Landry sent an e-mail to Wenzel instructing her to schedule a meeting with her and warning Wenzel that she would be terminated if she continued to refuse to meet with her. Wenzel did not schedule a meeting with Landry.

7) On September 12, 1994, Jarrett responded to Wenzel's e-mail of September 10 and instructed her that because Landry, not Schackow, was her Personal Development Manager, that she had to work with Landry on her development plan. Jarrett instructed her to schedule a meeting with Landry as soon as possible. Wenzel responded, by e-mail dated September 15, 1994, that she thought the open door investigator had determined that Jarrett, not Landry, should meet with Wenzel regarding her development plan.

8) On September 16, 1994, Jarrett responded to Wenzel by e-mail and informed her that the open door investigator had recommended that Wenzel meet with Jarrett and Landry to discuss a variety of issues, but that some issues had to be addressed by Landry as Wenzel's Personal Development Manager. Jarrett offered to meet with Wenzel and Landry, and instructed her once again to let Jarrett know when she was available for such a meeting, admonishing her that she could not continue to refuse to meet with them.

9) On September 21, 1994, Jarrett sent Wenzel yet another e-mail in which she stated, among other things: "As I have explained to you before, your refusal to meet with your line management is insubordination and will not be tolerated. I have been extremely patient with you and have given you every opportunity to comply with my request. However, this behavior cannot continue." Jarrett instructed Wenzel to promptly let her know when she was available to meet with her and Landry, either together or separately. Wenzel did not contact Jarrett or Landry to schedule a meeting.

Because of Wenzel's failure, to schedule a meeting with either Jarrett or Landry, they decided to terminate her employment. A letter terminating Wenzel's employment was delivered to her home on October 13, 1994. At this time of her termination, Wenzel was approximately three months from her 50th birthday, at which time she would have been within five years of qualifying for retirement and

therefore would have qualified for IBM's Retirement Bridge Leave of Absence Program, which would have permitted her to take a leave of absence from IBM and then retire from IBM when she qualified for retirement.

On October 13, 1994, immediately prior to receiving her letter of termination, Wenzel filed a discrimination charge with the EEOC. She amended this charge on October 17, 1994, and again on May 17, 1995. Wenzel's charge, as finally amended, reads as follows:

I. I was employed as an Advisory I/T Specialist. On April 27, 1994, 1 received negative comments on my performance appraisal. On May 20, Lisa Landry, Professional Development Manager, demanded that I sign a Condition of Employment Letter with a threat of termination if such conditions were not met. On October 13, 1994, 1 received a hand delivered letter left in my mail box indicating that I was terminated effective immediately,

II. Mike Heneghan, Professional Development Manager, said that my performance appraisal was accurate. Lisa Landry refused to indicate why the Condition of Employment Letter was required. Gail Walker Jarrett, PDM Manager, wrote that I was terminated due to failure to attend meetings.

III. I believe that I was discriminated against due to my

> age, 49, retaliated against due to my previous charge of discrimination ...and retaliated against due to my stated intention to file a new charge of discrimination on October 13, 1994, in violation of the Age Discrimination Act of 1967, and Title VII of the civil Rights Act of 1964, as amended, because of my sex, Female.

The EEOC charge indicates that the alleged discrimination took place between April 27, 1994, and October 13, 1994.

DISCUSSION

Wenzel alleges that IBM discriminated against her on the basis of her age and gender and that it retaliated against her for pursing her complaints of discrimination via IBM's Open Door Program and in her EEOC charges in 1992 and October 1994. Each of these claims is addressed separately below.

A. Wenzel's ADEA Claim

Wenzel's claim of age discrimination is based entirely on the fact that she was terminated approximately three months prior to her 50th birthday, at which time she would have been eligible to participate in IBM's Retirement

Bridge Leave of Absence because she would have been within 5 years of being eligible for retirement; that is, she would have been within 5 years of attaining age 55 and having 15 years of service with IBM. [FN5] Her termination therefore delayed her eligibility to receive retirement benefits to age 62 and also decreased the amount to which she will ultimately be entitled. Wenzel also alleges that the timing of her termination prevented her from receiving continuation of medical benefits. However, even assuming that the sole reason IBM terminated Wenzel was to deny her the ability to participate in the Retirement Bridge Leave of Absence and decrease her pension and medical benefits, this was not a violation of the ADEA. The United Supreme Court addressed this issue in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) and noted that "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing

stereotypes" regarding older workers, such as the belief that productivity and competence decline with old age. Biggins, 507 U.S. at 610. However,

> [w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.

Id. at 611. Therefore, when an employer terminates an older employee solely because the employee is close to vesting in his or her pension, the employer does not violate the ADEA. Id.

When the Court in Biggins declined to consider "the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service," that is not the case here. Wenzel would not have qualified for the Retirement Bridge Leave of Absence Program solely because of her age, but because of the combination of her age and years of service. Accordingly, under the reasoning of Biggins, Wenzel's claim that IBM terminated

her at least in part in order to prevent her from qualifying for the Retirement Bridge Leave of Absence Prolgram is not actionable under the ADEA. [FN6]

B. Wenzel's Retaliation Claim

Title VII prohibits retaliation by an employer against an employee who complains of or opposes unlawful employment practices. "An actual violation of Title VII is not a prerequisite for a retaliation claim; the employee need only have a sincere and reasonable belief that she is challenging conduct that violates Title VII." Hunt-Golliday v. Metropolitan Water Reclamation Dist, 104 F.3d 1004, 1014 (7th Cir. 1997). Wenzel alleges that IBM retaliated against her for complaining of employment discrimination in the following ways: (1) filing her 1992 EEOC charge; (2) utilizing the Open Door Program to complain of discrimination; and (3) intending to file her 1994 EEOC charge.

Wenzel has not asserted any direct evidence that IBM's actions were in retaliation for her complaints of employment discrimination. Therefore, Wenzel's retaliation claim must be analyzed using the burden-shifting method set forth in McDonnell Douglas Corp. v. Green, 41 1 U.S. 792 (1973). To establish a prima facie case of retaliation, Wenzel must show:

> (a) that she engaged in statutorily protected expression;
> (b) that she suffered adverse action by her employer; and
> (c) that a causal link exists between the protected expression and the adverse action.

Hunt-Golliday, 104 F.3d at 1014. If Wenzel establishes her prima facie case, IBM may rebut the resulting inference of discrimination by articulating a legitimate, nondiscriminatory reason for its actions. The burden then shifts back to Wenzel to show that IBM's articulated reason is merely a pretext for discrimination. See id.

Wenzel has established the first two elements of her prima facie case--she complained of actions she perceived as discriminatory and she was reprimanded and later

terminated by her employer. However, as far as her 1992 EEOC charge is concerned, she has failed to present any evidence which establishes the third element -- that there was a causal link between her complaints of discrimination and her termination.

Wenzel's theory regarding her retaliation claim seems to be that IBM behaved itself until May 1993, when she withdrew her 1992 EEOC charge, and then began a concentrated effort to retaliate against her.' She argues that the suspicious timing of IBM's actions supports her assertion that those actions were linked to her 1992 EEOC charge. However, other than the bare assertion in her brief that "Gail Walker Jarrett was most friendly to Plaintiff during the time the [1992] EEOC charge was open but Gail Walker Jarrett's friendliness ended in 1993 when the EEOC charge was closed," Wenzel's Brief at 4, and a vague reference to "continued acts of discrimination and harassment," Wenzel's Brief at 6, neither Wenzel's 1994

EEOC charge nor her brief point to any allegedly retaliatory act by anyone at IBM between the withdrawal of her EEOC charge in May 1993 and her performance appraisal in April 1994, almost a year later. Indeed, Wenzel's 1994 EEOC charge notes that the earliest act of discrimination was April 27, 1994, the date she met with Heneghan regarding her performance appraisal.

While suspicious timing constitute indirect evidence of retaliation, see Hunt- Gollidy, 104 F.3d at 1015, "as the temporal distance between [the claimant's] protected expression and the adverse action increase[s], it is less likely that there is a causal link between the two events." McClendon v. Indiana Sugars, Inc., 108 F.3d 789, 797 (7th Cir. 1997). Thus, while the Seventh Circuit has found a causal nexus between actions taken within a few days or a week of protected activity, see id., here almost a year elapsed between the time Wenzel withdrew her 1992 EEOC charge and the first allegedly retaliatory act, her

performance evaluation. This time period, without more, is simply too great to establish a causal connection between the two events.

Wenzel also argues that she was retaliated against for pursuing her open door complaint and for planning to file her 1994 EEOC charge. As the open door complaint at issue was filed after her performance appraisal, obviously the appraisal could not have been in retaliation for her complaint. However, her condition of employment letter was issued just a few weeks after she instituted the open door complaint regarding her performance appraisal, and her termination occurred on the same day that she filed her 1994 EEOC charge. [8] The Court finds that this timing is sufficiently suspicious to support an inference that Wenzel's managers issued the condition of employment letter and ultimately terminated Wenzel because she had instituted an open door complaint alleging discrimination after receiving her performance appraisal.

The burden thus shifts to IBM to articulate a legitimate, non-discriminatory reason for issuing the condition of employment letter and for terminating Wenzel. IBM has satisfied this burden. The condition of employment letter was issued after Wenzel's managers received reports that Wenzel had contacted Steven Rainos, Judy Battista, and Marcy Bradley and confronted them regarding comments they made which influenced her performance appraisal. Both Battista. and Bradley reported that they felt threatened by their conversations with Wenzel. This was certainly ample justification for reprimanding Wenzel in the form of a condition of employment letter. Further, IBM asserts that it terminated Wenzel because she refused to meet with her managers, Landry and Jarrett, for a period of over four months after her performance evaluation. IBM has submitted evidence which shows that Landry, Jarrett, and others at IBM repeatedly instructed Wenzel to meet with Landry and Jarrett, and that Wenzel failed to do so.

Wenzel argues that these reasons are pretextual and that Landry, Jarrett, and numerous others at IBM engaged in a concerted effort to fabricate a reason to terminate her. While Wenzel's brief is not clear as to what evidence she is asserting to support this theory, Wenzel points out the following in various parts of her brief:

1. IBM assigned Landry, an African-American woman, as Wenzel's Personal Development Manager, so that it would be "extra protected" when Wenzel claimed discrimination.

This is mere speculation on Wenzel's part and simply does not support an inference that IBM was retaliating against Wenzel.

2. On January 7, 1994, Heneghan instructed Wenzel to delete voicemail messages she had saved for over 30 days because they were taking up too much storage space in the voicemail system. When Wenzel refused because she was saving the messages as part of an open door investigation, Heneghan e-mailed his superiors., commenting that "I need to know when we can say enough is enough and deal with this as a performance or insubordination issue."

This incident demonstrates that Heneghan was frustrated with Wenzel's arguably insubordinate behavior as early as

January 1994, but simply does not support an inference that he was part of a conspiracy to retaliate against her for her protected activities.

3. Wenzel was a highly utilized employee and was appreciated, and even sought after, by many of her customers.

IBM has never claimed that Wenzel was not a good employee in many aspects or that she was terminated for poor job performance. Indeed, her April 1994 performance appraisal was, overall, quite positive. However, IBM has presented evidence that Wenzel behaved in an insubordinate manner, and no matter how good an employee may be at her job, an employer is clearly entitled to terminate her if she is insubordinate to her superiors or otherwise causes trouble in the workplace.

4. On May 16, 1994, Landry paged Wenzel and instructed her to meet with her by 3:30 that afternoon. Wenzel responded to these pages by leaving Landry numerous voicemail messages explaining that she was involved with a customer and unable to meet that day and expressing concern at the fact that she was unavailable.

While this demonstrates that Wenzel was responsive to Landry prior to receiving the condition of employment letter, as set forth above the record is clear that Wenzel subsequently (that is, after Landry met with her regarding the condition of employment letter) refused to meet with Landry, and it is that refusal which led to her termination.

5. Landry contacted another IBM employee, Carolyn Perry, on May 27, 1994, asking her for information regarding "any resource opportunities that Sandra Wenzel would not take.." Landry also forwarded an e-mail Wenzel had sent to her stating that she did not feel it was necessary for the two of them to meet while the open door investigation was proceeding to another IBM manager and asked whether Wenzel's statement constituted insubordination.

These actions by Landry indicate that Landry was unhappy with Wenzel's behavior and may in fact, have begun the process of documenting that behavior in order to support Wenzel's eventual termination. However, nothing in these actions, or anything else pointed to by Wenzel, suggests that Landry (or anyone else at IBM) was acting in retaliation for her complaints of discrimination; rather, they

are all entirely consistent with the fact that once Wenzel received the condition of employment letter she refused to meet with Landry.

Even after carefully reviewing Wenzel's brief in search of any argument which may support her claim that IBM's proffered reasons for reprimanding and terminating her were pretextual, the Court has been unable to discen any. Accordingly, IBM is entitled to summary judgment on Wenzel's retaliation claim.

C. Wenzel's Sex Discrimination Claim

Finally, Wenzel argues that IBM discriminated against her in the basis of her sex. 'While it appears from her brief that Wenzel wishes to reassert the claims she made in her 1992 EEOC charge and raise other claims regarding unspecified ways in which she was treated differently then male employees at IBM, these claims are not properly before this Court. "As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in

her EEOC charge." Cheek v. Western & Southern Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994).

> The test for determining whether an EEOC charge encompasses the claims in a complaint ... grants the Title VII plaintiff significant leeway: all Title VII claims set forth in a complaint are cognizable that are "like or reasonably related to the allegations of the charge and growing out of such allegations.". . . The claims are not alike or reasonably related unless there is a factual relationship between them. This means that the EEOC charge and the complaint must, at a minimum, describe the same conduct and implicate the *same individuals*.

Id. at 500-01 (citations omitted) (emphasis in original).

Here, Wenzel's EEOC charge, as amended, encompasses only her performance appraisal, condition of employment letter, and termination. Any actions by IBM that Wenzel may feel were discriminatory but that are not related to these three items [9] are outside the scope of her EEOC charge and may not be considered here.

As for those actions which are included in Wenzel's EEOC charge, under the McDonnell Douglas burden shifting analysis, in order to establish a prima facie case of sex discrimination Wenzel must show that (1) she belongs

to a protected class (in this case, women); (2) she performed her job satisfactorily; (3) she suffered an adverse employment action, and (4) IBM treated a similarly-situated male employee more favorably. Greenslade v. Cbicago Sun-Times, Inc., 112 F.3d 853, 863 (7th Cir. 1997). Wenzel has failed to establish her prima facie case, as she has failed to show that IBM treated a similarly-situated male employee more favorable than her. The closest Wenzel comes to attempting to make this showing is the following: "Doyle Kincaid, a male, was not ten-ninated by Lisa Landry for insubordination although she accused him of it. Plaintiff intends to call Doyle Kincaid as a witness at trial ... and where he can state whether or not he was even disciplined." Wenzel's Brief at 1 0-11 . As evidence of Kincaid's insubordination toward Landry, Wenzel cites to a comment by Landry in a memo to Jarrett dated August 12, 1994, that "[b]ecause of [Wenzel's] influence I am beginning to see other of my employees

behave in an insubordinate manner (ex Doyle Kincaid)." This is clearly insufficient to establish that Kincaid,)" was "similarly situated" to Wenzel, as there is no indication of what type or degree of insubordination Kincaid exhibited toward Landry, while there is ample evidence that Wenzel ignored her managers' instructions over a significant period of time before she was terminated. Accordingly, Wenzel has failed to establish a prima facie case of sex discrimination, and IBM is entitled to summary judgment on that claim as well. [FN10]

CONCLUSION

For the reasons set forth above, the Court finds that IBM is entitled to summary judgment on all claims raised in Wenzel's complaint, and IBM's motion for summary judgment is GRANTED in its entirety.

ENTERED this 21st day of July, 1998.

/S/ Larry J. McKinney
Larry J. MCKINNEY, JUDGE
United States District Court Southern District of Indiana

Copies to:

Sandra Wenzel
624 Marana Drive
Carmel, IN 46032

Susan M Zoeller
Barnes & Thornburg
1313 Merchants Bank Building
II South Meridian
Indianapolis, IN 46204

FN1. As Wenzel's Professional Development Manager, Heneghan was responsible for assisting her in developing a career development plan, managing and counseling her, gathering and analyzing informal input regarding her performance from her team members, peers, customers, and business leaders, and conducting her formal performance evaluations.

FN2. This did not suggest that Wenzel was not working hard enough, only that she was spending a large amount of her time serving customers in a non-billable capacity.

FN3. Under IBM's Open Door Program, if an employee had a problem which was not satisfactorily resolved by the employee's manager, he or she could raise the problem with higher management, beginning with the senior manager at the employee's location and, if necessary, continuing with the office of the Chief Executive Officer, where an investigator would be assigned to investigate the complaint and recommend a resolution to the appropriate senior executive. Wenzel asserts that she had the right under the Open Door Program ultimately to have her complaint reviewed by IBM's Chief Executive Officer ("CEO"), Louis V. Gerstner, Jr., personally. Wenzel's Brief at 19 (citing

IBM's Open Door Policy, Issued 3-1-93, at ¶ 8, Exhibit 3X to Wenzel's Brief). This assertion is based upon a misinterpretation of the Open Door Policy, which states that the CEO will review the findings of an open door investigation and issue a written decision "[i]n the case of Open Door investigations assigned by the IBM chief executive officer." Wenzel's open door investigation was not assigned by the CEO, but was instead assigned by Robert LaBant, General Manager of IBM North America, who did, in fact, review the investigation and issue a letter to Wenzel regarding his conclusions.

FN4. Wenzel denies making this threat to Battista in her Brief, although she does not make this denial in an affidavit form. However, it remains undisputed that Battista reported to Heneghan and Jarrett that Wenzel had threatened and frightened her.

FN5. IBM employees are eligible for retirement when they meet one of the following requirements: (1) 30 years of active service; (2) age 55 with 15 years of service; (3) age 62 with 5 years of service; or (4) age 65 with one year of service.

FN6. Wenzel also argues that the fact that in order to receive enhanced separation pay IBM employees were required to sign a release in which they agreed, among other things, not to sue for age discrimination proves, or at least suggests, that "age discrimination was part of IBM's corporate environment. Standing alone, offering severance pay in exchange for a release of the right to sue for age discrimination is not evidence of age discrimination. Partington v. Broyhill Furniture Indlus., Inc., 999 F.2d 269, 271 (7th Cir. 1993) ("Standing by itself, all this evidence showed was that Broyhill was aware that a company that dismisses an older worker has potential liability under the

age discrimination law. No inference of guilt can be drawn from awareness of one's legal obligations . . . .")

FN7. The Court assumes, without deciding, that if proven this would be a valid retaliation claim, even though it puts a different spin on the usual retaliation claim, in which an employee is retaliated against after filing a discrimination claim, not after withdrawing one.

FN8. The Court notes that Wenzel has submitted no evidence which shows that her managers were aware of her intent to file her 1994 EEOC charge when they made the decision to terminate her, and indeed IBM denies that they were aware of this fact. However, there is at least some suggestion in the record that Wenzel's managers were aware that she had an attorney advising her regarding her open door complaints, and, giving Wenzel every possible benefit of the doubt, and especially considering the fact that Wenzel had filed an EEOC charge previously and had been using the term "discrimination" quite frequently in her communications with various IBM managers, the Court finds that the inference could be drawn that Wenzel's managers were at least aware that an EEOC charge would likely be forthcoming.

FN9. For example, Wenzel vaguely asserts in her brief that she "actively sought career advancement that was denied" and that she was required to travel while male employees were not.

FN10. "The Court notes that even if Wenzel had established a prima facie case, as discussed with regard to Wenzel's retaliation claim IBM has articulated legitimate reasons for its actions and Wenzel has not proffered any evidence that these reasons are pretextual.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Sandra M. Wenzel, Plaintiff,	)	
vs.	)	No. IP96-1704-C-M/S
International Business Machines Corporation,	)	
Defendant	)	

PLAINTIFF'S ANSWER BRIEF IN OPPOSITION TO DEFENDANT INTERNATIONAL BUSINESS MACHINES CORPORATION'S MOTION FOR SUMMARY JUDGMENT

STATEMENT OF GENUINE ISSUES

1. **Evidence Exists to Support Plaintiff's Claims of Sex Discrimination and Retaliation in Plaintiff's EEOC Charge Filed on May 15, 1992**

Although IBM claims Plaintiff was told by Gail Walker in June, 1992, that Plaintiff had been removed from the surplus list because several employees elected to take an enhanced separation package, both Plaintiff's e-mail of October 13, 1994, to Louis V. Gerstner, Jr., IBM's Chairman of the Board and Chief Executive Officer (Ex. 1A at 3), and IBM's Fourth Privilege Log (Ex. 1B at 2) document that Plaintiff 's removal from the surplus list occurred after IBM was notified of Plaintiff's EEOC charge filed on May 15, 1992. While an actual violation of Title VII is not a prerequisite for a retaliation claim but only that an employee has a sincere and reasonable belief that conduct violating Title VII is being challenged (Holland v. Jefferson Nat'l Co., 883 F.2d 1307, 1314 (7th Cir.1989-)), Plaintiff's current claims

are strengthened by the validity of Plaintiff's previous claims: IBM is a company that condones discrimination and retaliation. Although it now appears that Linda Austin, Plaintiff's manager, and Barbara Dower, IBM Personnel, initially tried unsuccessfully in 1988 and 1989, respectively, to use IBM's internal medical staff to discredit Plaintiff (Ex. C), Plaintiff's claims were validated in IBM's investigation, as documented in Plaintiff's letter of October 26, 1989, to Chris Downall, Branch Manager of IBM Professional Services (Ex. 1D) and the deposition of Judd Sloan (Ex. 4A at 40-50), a former IBM who witnessed the behavior towards Plaintiff, filed his own complaint with IBM local management, and was contacted during the investigation requested by Chris Downall.

Although IBM admits that Ron Moore and Ellis Holman was "strongly counseled, " IBM does not state when it occurred and, if so, it did not stop the behavior towards

Plaintiff, as documented in Judd Sloan's deposition (Ex. 4A at 48). All three men were promoted prior to Plaintiff (Ex. 1E), Moore and Sloan being promoted during the time of IBM's investigation! IBM's claims that Moore, Stone, and Holman were promoted prior to Plaintiff due to superior skills is highly questionable to both IBM employees and IBM customers, as documented in Sloan's deposition (Ex. 4A at 29-35), Kincaid's deposition (Ex. 4B at 21-22), Stephens' deposition (Ex. 3Y at 11-12), and Copple's deposition (Ex. 3Z at 8-12). Additionally, high billable utilization or the number of customer contract hours billed was the main criteria of measurement in a person's evaluation (Ex. 4A at 17-19). Plaintiff not only billed more hours than Ron Moore and Ellis Holman (Ex. 1F at 4) but Plaintiff actually billed the highest number of hours in Professional Services (Ex. 1G at 2).

When Plaintiff went to Mike Wiley on May 12, 1992 (Ex. 1G at 1), the day after Plaintiff was placed on the surplus list by Carolyn Perry and before Plaintiff filed an EEOC charge on May 15, 1992 (Ex. 1H), an Open Door investigation was initiated by Mike Wiley. That Open Door revealed that input from Roger Battista, Plaintiff's manager in 1991, has been used in placing Plaintiff on the surplus list. Plaintiff's claims that Plaintiff was told by Roger Battista that Plaintiff was 4th or 5th in Plaintiff's peer group are verified in the November 26, 1991 letter of Chuck Giarratana, Commercial Branch Manager, that ranked Plaintiff as 4th in a group of 40 peers (Ex. 1I). (Note that Plaintiff is ranked higher at #4 than Steve Goedde at #7, making IBM remarks that Steve Goedde had the skills set required at the Netherlands, as if Plaintiff did not, highly questionable.) It appears that Roger Battista sought to have Plaintiff's ranking lowered and his input was

provided to Carolyn Perry even though Plaintiff was told by Phil Canada, Plaintiff's manager during 1991 and 1992 after Roger Battista was Plaintiff's manager, that Plaintiff had been ranked at the very top, if not the top, of his employees.

2. **More Than One Year Between the Filing of Plaintiff's 1992 EEOC Charge and IBM's Alleged Retaliation is Too Remote to Establish A Causal Connection is Disputed**

To establish a causal link, Plaintiff only has to establish "that the protected activity and the adverse action are not wholly unrelated, " Simmons v. Camden County Bd. of Educ. 757 F.2d 1187, 1189 (11th Cir.1985).

For a year of that time both Plaintiff and IBM were waiting for the EEOC to investigate Plaintiff's charge. During the period of time Plaintiff's EEOC charge was still open, Plaintiff was treated favorably by IBM. Gail Walker Jarrett was most friendly to Plaintiff during the

time the EEOC charge was open but Gail Walker Jarrett's friendliness ended in 1993 when the EEOC charge was closed. As documented in Plaintiff's e-mail of September 15, 1993, to Drew Terry, IBM attorney (Ex. 1J) and Plaintiff's e-mail of November 23, 1993, to Mike Wiley (Ex. 1S at 4), Plaintiff had voiced concerns to David Tite, EEOC investigator, about signing off on Plaintiff's charge. At that time Plaintiff was given the impression that although the EEOC had never investigated Plaintiff's claim, a year had passed and the EEOC director wanted it closed. In reviewing IBM's Fourth Privilege Log (Ex. 1B at 2) and seeing the name, Melinda Hunkins, however, Plaintiff now recalls David Tite mentioning that prior to his contacting Plaintiff about closing out the charge, a representative from IBM had called about whether or not the EEOC was going to request anymore information, an indication that IBM was interested in getting the charge closed. In

reviewing the Privilege Logs submitted by IBM in this case on November 21, 1997 (Ex. 1L), December 22, 1997 (Ex. 1M), February 27, 1998 (Ex. 1N), and March 2, 1998 (Ex. 1B), Plaintiff has identified by date at least four IBM attorneys involved in "reflecting ... strategies and mental impressions,...thoughts,...' regarding Plaintiff EEOC charge of 1992 (Ex. 1B at 2-3). Viewing indirect evidence in the most favorable light for Plaintiff's case, sufficient evidence exists to suggest a legal strategy of waiting, letting time elapse to dilute Plaintiff's claims. And, Plaintiff was now reporting to Mike Heneghan in the Midwestern Customer Service organization of which Mike Wiley was General Manager. "Suspicious timing does constitute circumstantial, or indirect, evidence to support a claim of intentional discrimination or disparate treatment." (Troupe v May Dept. Stores Co., F.3d 734, 736 (7th Cir. 1994)).

3. Plaintiff's Claim of Sex Discrimination is not Time-Barred

In Plaintiff's deposition of February 17, 1998 (Ex. 5 at 492-495), Plaintiff testified that the EEOC charge filed on October 13, 1994, included the charge of sex discrimination although the EEOC did not mark the box (Ex.5 at 493). Mike Holmes, EEOC, told Plaintiff that all charges filed against IBM in the initial charge were assumed in Plaintiff's charge being filed because the charge was related to the initial charge. The initial charge of May 15, 1992, was even referenced by number in the charge filed on October 13, 1994 (Ex. 1O). Plaintiff was expecting to give an affidavit to elaborate on the charge, as had been done on the initial charge (Ex. 1P), but Plaintiff was told an affidavit was no longer required for filing and would be done later during an investigation. In order to make sure there was

no misunderstanding, Plaintiff's attorney later advised Plaintiff to amend the claim so that the box on the charge was actually marked, which Plaintiff did on May 17, 1995 (Ex. 1Q). Plaintiff also stated in the deposition that the EEOC person even left Plaintiff's age as 49 although Plaintiff's age was now 50, keying in the charge as it was stated on the amended charge of October 17, 1994 (1R). Since IBM's counsel refused to provide Plaintiff with a copy of the charge of October 17, 1994, for comparison during the deposition (Ex. 5 at 494), Plaintiff was unable to see that the EEOC person had also added the term "because of my sex, Female" to Paragraph III (See Ex. 1Q). But, that addition is immaterial in light of the logical explanation given by the EEOC to Plaintiff. The EEOC is well-versed in time limitations and the EEOC knew no time limitations had been exceeded. The EEOC subsequently issued Plaintiff

with a letter of right to sue on all claims without limitation.

Plaintiff disputes the distortion by IBM that Plaintiff was limiting Plaintiff's claims of sex discrimination to only those Title VII violations of Plaintiff's initial claim because Plaintiff is not. Furthermore, Plaintiff responded to questions regarding that amended charge (Ex. 5 at 492-495) and no questions were asked by IBM at that time regarding specific facts upon which Plaintiff based Plaintiff's claims. IBM not only failed to document a reference in IBM's brief but IBM attempted to distort statements by Plaintiff out of context. In both verbal and written communications with IBM, Plaintiff has referred to continued acts of discrimination and harassment, as evidenced in Plaintiff's e-mail of November 23, 1993 to Mike Wiley stating that harassment/discrimination had returned once again (Ex. 1S at D[illegible]00219). Even so, Plaintiff's claim that was

amended on October 17, 1994 (Ex. 2R) lists April 27, 1994 as the earliest date discrimination took place and October 13, 1994 as the latest date, further stating that "On October 13, 1994, I received a hand delivered letter left in my mail box indicating that I was terminated effective immediately." (Ex. 2R at #I)

4. **Plaintiff's Claim of Sex Discrimination is not Outside the Scope of Plaintiff's EEOC Charge Filed on October 13, 1994, With Amendments on October 17, 1994, and May 17, 1995**

Plaintiff's concerns were voiced to IBM management without resolution. Not only did Plaintiff voice concerns about adverse actions against Plaintiff but Plaintiff actively sought career advancement that was denied. The issue was addressed with Mike Heneghan but he did not promote Plaintiff. Plaintiff's prior manager, Terry Schackow, had sought opportunities for Plaintiff to demonstrate business and leadership skills

and Plaintiff desired to gain certification. Yet, Steve Ramos requested that Plaintiff be removed as Networking Team Leader even though he was no longer assigned as the Business Leader sponsor (2E at 100210). Bob Clayton only spoke positively about Plaintiff and conveyed positive comments from team members to Plaintiff (Ex. 4C at 10-12).

In Plaintiff's deposition on February 17, 1998 (Ex. 5 at 338-339), Plaintiff spoke of Plaintiff's observation that a woman had been in a position as Plaintiff's manager or the manager of Plaintiff's manager when specific adverse actions had occurred. Plaintiff stated that a woman, Chris Downall, was the Branch Manager who allowed the actions of Ron Moore, Brian Stone, and Ellis Holman against Plaintiff in 1988 and 1989; that Carolyn Perry, a woman, was Plaintiff's manager when Plaintiff was placed on the surplus list in 1992; and Lisa Landry, a black woman, was the manager who

terminated Plaintiff. Plaintiff pointed out in that deposition that as soon as Plaintiff saw that Lisa Landry was Plaintiff's manager in 1994, Plaintiff was distressed. Plaintiff felt that IBM was going to use a woman, a black woman, so that IBM be "extra protected' by any later claims by Plaintiff (Ex. 5 at 339). In spite of those statements made on February 17, 1998, IBM still stated in IBM's brief for summary judgment that "Even if Plaintiff's sex discrimination claim were within the scope of her EEOC charge, it is difficult to imagine how Plaintiff could allege that she was discriminated against on the basis of her sex when she had two women managers." That statement alone disputes IBM claim of entitlement to summary judgment in that all issues of material fact have not been disclosed in IBM's brief nor have all issues of material fact been disclosed in their full context. IBM is withholding evidentiary material

necessary for the resolving genuine issues of material fact.

Likewise, Plaintiff's e-mail to Al Wells and Dan Fury on June 6, 1994, Plaintiff mentioned the tactic of getting women involved (1U). While Plaintiff was being accused of insubordination, Plaintiff made Steve Kelley aware that Plaintiff felt the actions of Lisa Landry and Gail Walker Jarrett against Plaintiff were harassment (Ex. 2U at 13). Title VII applies to same-sex harassment. In truth, Plaintiff is not quilty of insubordination; rather, Lisa Landry and Gail Walker Jarrett are guilty of harassment in their actions against Plaintiff,

One tactic to distort Plaintiff's claims was taken by Gail Walker Jarrett in responding to Plaintiff's concerns about Lisa Landry by accusing Plaintiff of making racist remarks which Plaintiff did not make, as documented in Plaintiff's e-mail response of June 16, 1994 (Ex. 1T).

Plaintiff's e-mail of June 6, 1994, to Gail Walker Jarrett was only elaboarating on Plaintiff's comments related to discrimination by women in the previous e-mail of May 20, 1994, sent by Plaintiff to Gail Walker Jarrett before Plaintiff met with Lisa Landry (Ex. 1T at DEF 100109). When Plaintiff received the e-mail response from Gail Walker Jarrett (1T), Plaintiff felt that Gail Walker Jarrett had been told to send the note to Plaintiff so it could later be used against Plaintiff. Found in the discovery materials sent by IBM was a copy of the e-mail note sent by Plaintiff to Gail Walker Jarrett and copied to Al Wells, Office of the IBM Chairman and CEO, and Dan Fury who was at that time the Open Door investigator, (Ex. 1U), one of many pieces of evidence verifying that confidentiality of the Open Door process had been breached. And, while IBM's brief states that "Jarrett was of course concerned by Plaintiff's accusations," discovery documents from IBM

indicate that Gail Walker Jarrett did not even write the note but that it was written by Cathe Moran and sent with Gail Walker Jarrett's userid (Ex. 1V). This action alone casts doubt on the authenticity of IBM's alleged evidence against Plaintiff.

5. **Evidence Exists to Support Plaintiff's Claim of Sex Discrimination in Plaintiff's EEOC Charge Filed on October 13, 1994, With Amendments on October 17, 1994, and May 17, 1995**

IBM has continued its attempts to discredit and/or distort Plaintiff's claim of sex discrimination against IBM, further evidenced by IBM's recent request to the Court for Plaintiff to be ordered to submit to a mental examination. Plaintiff has opposed that motion by IBM, a current legal tactic that sounds like the attempts made by Linda Austin and Barbara Dower to refute Plaintiff's claims dating back to 1988 and 1989! In Plaintiff's e-mail of December 7, 1993 to Mike Wiley (Ex. 1W),

Plaintiff attempted to explain that "The events that have occurred over the past few months are simply an occasion or excuse, and are symptomatic of the real issue involved." Just a review of the sequence of events listed by Tom Altman in Open Door records for 1993 and 1994 (Ex. 1S 1-5) verify specific incidents that Plaintiff claimed to have reported (although Plaintiff recalls the meeting took place with Steven Zaudtke in August, 1993, not October, 1993). Even isolated instances can establish a pattern of discrimination when viewed as a whole, especially since IBM refused to thoroughly and responsibly investigate Plaintiff's claims. As Plaintiff was the only female reporting to Lisa Landry (Ex. 1X at 1) and the only female on the Networking Team (Ex. 1Y), Plaintiff worked in an environment heavily dominated by men. Plaintiff communicated concerns of discrimination to Mike Wiley

and Steve Zaudtke (Ex. 1S at 2-5), not excluding others.

Input by Steve Ramos made accusations of insubordination by Plaintiff but Steve Ramos was functioning as a peer in his role as a Business Leader assigned to the Networking Team. As stated by Steve Zaudtke, his manager, the teams were a self-directed teams and the Business Leaders were members (Ex. 1Z). Steve Zaudtke further asks in his notice of a meeting with team leaders "what do you need from BUE and Business Leaders?" (Ex. 2A) Steve Ramos, himself, refers to the role as a "sponsor" in the recording on the cassette tapes submitted *In Camera* to the Court. Bob Clayton further confirms that he was not managing the Networking Team (Ex. 4C at 6-10). Yet, Steve Ramos was an active participant in providing negative input to management. While he claims he selected

Plaintiff to be the Networking Team Leader, Plaintiff actually requested it (Ex. 2A).

Plaintiff continued to experience the disparate treatment in Customer Service that had occurred in Professional Services. As one example, when Linda Austin was Plaintiff's manager, she admitted that many of the men were not even being asked to travel since travel was not a condition of employment when they were hired. Plaintiff made Linda Austin aware that travel was not a condition of employment when Plaintiff was hired. Plaintiff had to also remind and/or make Roger Battista aware of this hiring status in 1991. (Neither did Plaintiff have "regular driver" status and receive enhanced travel compensation from IBM.) While Linda Austin admitted the "double standard," no one in Customer Service would really listen to Plaintiff's concerns, later retaliating against Plaintiff. When Plaintiff, after Plaintiff's two (2) requests for another manager was

denied by Gail Walker Jarrett (Ex. 1T at DEF100109), requested a Request For Transfer (RFT) form be sent to Plaintiff in order for Plaintiff to move from the hostile work environment, none was sent. Per Bobby Clayton, the Request for Transfer option was available to all IBM employees (Ex. 4C at 43-44), but that option was denied to Plaintiff.

In the "Wenzel" log sent to Plaintiff by IBM, Lisa Landry stated (Ex. 2D at 100211) that "Because of her influence I am beginning to see other of my employees behave in an insubordinate manner (ex Doyle Kincaid)." As of November 1, 1994, no females were reporting to Lisa Landry (Ex. 2C) but Doyle Kincaid was reporting to Lisa Landry. Doyle Kincaid testified in his deposition of February 13, 1998 (Ex. 4B at 6) that he retired from IBM after thirty plus years. Doyle Kincaid, a male, was not terminated by Lisa Landry for insubordination although she accused him of it. Plaintiff intends to call

Doyle Kincaid as a witness at trial (Ex. 5 at 509) where he can state whether or not he was even disciplined. Sufficient evidence exists to support Plaintiff's claims of disparate treatment and suggest that additional evidentiary evidence exists.

6. IBM Has Not Articulated a Legitimate Business Reason for Plaintiff's Termination

IBM demonstrated intent to terminate Plaintiff before the alleged actions by Plaintiff even occurred. Mike Heneghan stated in his e-mail of January 7, 1994, to Mike Wiley, Gail Walker Jarrett, and Bill Noah that "I need to know when we can say enough is enough and deal with this as a performance or insubordination issue." (Ex. 2D) It should also be noted that Plaintiff's e-mail of January 6, 1994, was referring to voicemail messages being kept for an Open Door investigation. Mike Heneghan wrote on Plaintiff's evaluation of April 27, 1994, that Plaintiff "declined to sign" although

Plaintiff' had told him Plaintiff would follow up on the issues in question and he voiced no objection (Ex. 5 at 260), as verified by Mike Heneghan's hand-written note (Ex. 2E).

In Lisa Landry's log, she stated that "Also told her that as far as I knew her appraisal had not been closed out and until that happened I could only handle her from an administrative standpoint (approving timecards, TEA, MEA, etc.)" (Ex. 2F at DEF 100203) How could Plaintiff be insubordinate to a person acting only in an administrative role. Plaintiff did communicate administratively with Lisa Landry by submitting required paperwork (Ex. 2G; 2H; 2I) of which a few examples are enclosed. Documents of IBM further cloud the issue in that a document entitled "Employee Status" and dated March 3, 1998, lists that Plaintiff was assigned to Lisa Landry on January 1, 1994 (Ex. 2K). If IBM was not clear as to whether or not, or when, Lisa Landry

was Plaintiff's manager, how can Plaintiff be expected to know? And, how could that confusion be called insubordination?

A hand-written note of May 4, 1994, was a draft for a Condition of Employment letter accusing Plaintiff of talking to other employees about Plaintiff's appraisal (Ex. 2L), hardly an offence for termination. IBM employees quite frequently discussed appraisals openly to one and all.

Lisa Landry contacted Plaintiff on May 16, 1994, two (2) years and one (1) day from the filing of Plaintiff's initial EEOC charge of May 15, 1992. And, the letter given on May 20, 1994, stated the date of May 16, 1994 (Ex. 2M).

In the pager messages transcribed by Plaintiff (Ex. 2N), Lisa Landry sent a message to Plaintiff stating that "I will consider your behavior insubordinate" but she refused to respond to Plaintiff's phone calls to x3311,

Lisa Landry's phone number (Ex.2O), when Plaintiff called as Lisa Landry instructed in her second pager message. Yet, in Lisa Landry's Log (2H at DEF 100204), she gave an entirely account of the events. While Lisa Landry claimed in that log that Plaintiff had not sent her "a pager msg back," Lisa had instructed Plaintiff to call her office number, which Plaintiff did! In the cassette tapes submitted to the Court *In Camera* are some of the messages Plaintiff sent to Lisa (some of which were copied to Gail Walker Jarrett). All issues of material fact cannot be resolved without an evaluation of those messages which will confirm there was absolutely no sign of insubordinate behavior in Plaintiff's response to Lisa Landry either by word, manner,or inflection of voice but, rather, distress at Lisa Landry's refusal to communicate with Plaintiff. Plaintiff wrote in Plaintiff's e-mail of May 20, 1994, to Gail Walker Jarrett, that Lisa Landry's actions that day

"greatly impeded my ability to focus on the customer situation." (Ex. 1T at DEF 100110) It should be further noted that in that same e-mail Plaintiff explained there was "no backup in this type of situation due to specific skills required and customer deadlines."

Lisa Landry wrote on the Condition of Employment letter that Plaintiff "refused to sign the notice but we went over it in detail." (Ex. 2M.) In Lisa Landry's log, however, she stated that "I gave Sandra no specific incidents." (Ex. 2H at DEF 100207). Plaintiff testified in Plaintiff's deposition that it was hard to believe that IBM would expect the document to be signed under duress (Ex. 5 at 441-442). And, Lisa admitted that 'it was improper for me to give her such short amount of time to consider the ESA. I had forgotten that she should have 21 days to consider it." (Ex. 2H at DEF 1006).

Lisa Landry contacted Carolyn Perry via e-mail on May 27, 1994, asking "Can you provide me ASAP with any details on resource opportunities that Sandra Wenzel would not take." (Ex. 2P)

Lisa Landry stated in her log that she forwarded an e-mail from Plaintiff to Cathe Moran "asking if it was not insubordinate." (Ex. 2Q) Lisa Landry also stated that Carol Berstien [sic] called me sometime between 05/23 & 5/30. She asked if I had heard from Sandra's attorneys. I said no. She assured me that I would but don't be upset it was typical attorney intimidation tactics." (Ex. 2H at DEF 100207)

Plaintiff disputes that Lisa Landry and Gail Walker Jarrett spent over four (4) months trying to meet with Plaintiff. When Bob Caswell met with Plaintiff on July 5, 1994, he indicated that he had told everyone to hold off on doing anything until he did an investigation. So,

messages were suspended until August, 1994, when Bob Caswell abruptly ended his "investigation." Plaintiff communicated with Bob Caswell (Ex. 2R) and Al Wells (Ex. 2R; 2S; 2T 2U) about the matter so Plaintiff actually had a pending Open Door issue at the time of Plaintiff's termination. And, while IBM attempts to further distort the issue by stating that Bobby Clayton testified he told Plaintiff to meet with Lisa Landry, a closer reading of his deposition indicates that he said Plaintiff was talking with him of Plaintiff's concerns about Lisa Landry and that he was not aware of Plaintiff's Open Door. As he further testified (Ex. 4C at 83-86), the Open Door was the proper procedure to follow to get a manager's directive changed. Plaintiff's attempts to communicate with Lisa Landry and Gail Walker Jarrett have been well-documented; however, IBM still refuses to comply with Plaintiff's discovery requests related to the actual availability of

Lisa Landry and Gail Walker Jarrett to meet with Plaintiff. While Plaintiff was working overtime, Gail Walker Jarrett took vacation (Ex. 1T at DEF 100109). Not only was Lisa Landry out of the office at the time of Plaintiff's termination (3V; 3W), but Lisa Landry was out of the office earlier for three (3) weeks of vacation (Ex.) and busy with paperwork upon her return. Plaintiff testified that the e-mail messages presented to Plaintiff during the deposition were incomplete in that they did not show the communications back and forth (Ex. 5 at 445-461). Taking isolated e-mail messages and omitting the responses is deceptive and concludes nothing. Isolated e-mail messages taken out of context do not present all the issues of material fact. Plaintiff did not refuse. As Plaintiff testified (Ex. 5 at 470), those notes appeared to be written to set the final stage for termination. As Bobby Clayton testified, a Condition of Employment letter was the first step to

termination (Ex. 4C at 21-26) so earlier claims by Plaintiff that Plaintiff's job was being threatened were true. Those threats to Plaintiff's job occurred before Plaintiff was accusing of refusing to meet with Lisa Landry and Gail Walker Jarrett. Viewed in the light most favorable to Plaintiff, a reasonable person taking into account preceding events could determine that allegations against Plaintiff were a pretext.

IBM rushed to Plaintiff's home on October 13, 1994, to hand deliver a letter of termination while Plaintiff was at the EEOC filing a charge, placing it in Plaintiff's mailbox. WHAT WAS THE RUSH?!? Even though IBM had been told that Plaintiff was going to the EEOC that day, IBM had no reason to beat the official notice from the EEOC if IBM's claim of insubordination was truly valid. Sufficient evidence exists to cast doubt on the timing of IBM's action and the validity of IBM's allegations against Plaintiff.

Statements in the affidavits as to lack of knowledge that Plaintiff was going to file an EEOC charge defy all reason. IBM has claimed Work Product Privileges on the grounds that IBM was preparing for litigation. Plaintiff's filing with the EEOC to get a letter of right to sue was a prerequisite to that litigation. To quote from IBM's brief, "a little common sense is not amiss..." Lisa Landry was out of town on October 13, 1994 (Ex. 2U; 2V) so IBM terminated Plaintiff at a time when it was impossible for Plaintiff to meet with her, an unconscionable action. That inability of Plaintiff to meet with Lisa Landry was not insubordination. There was never any refusal or Plaintiff to meet, as documented by Plaintiff 's correspondence to Lisa Landry (Ex. 2X), Gail Walker Jarrett (Ex. 2S at 13-15), Steve Kelley (Ex. 2S at 12-13), and Al Wells (Ex. 2S). As Plaintiff testified (Ex. 5 at 457-458), Plaintiff did not refuse, no specific deadline had been set by Lisa Landry and Gail

Walker Jarrett, neither had either of them set a specific date and time to meet, neither of them went to the customer site to meet with Plaintiff (always an option). Plaintiff had not requested a development plan from Lisa Landry or Gail Walker Jarrett. Even so, a new procedure had been implemented that year and introduced by Gail Walker Jarrett. Yet, the initial skills assessment was never submitted to Plaintiff to begin the process. How can IBM establish a business reason when Lisa Landry and Gail Walker Jarrett are acting under false pretense?

Plaintiff testified that Plaintiff felt attempts were being made to create situations where IBM could claim Plaintiff had "refused." (Ex. 5 at 470) Was this not what Mike Heneghan had proposed in January of 1994? (Ex. 2D) Not only is there evidence of intent prior to the alleged "crimes" of Plaintiff but there is evidence of a

systematic attempt to gather any and all "evidence' against Plaintiff, even to the extent of fabricating it. Event if the event occurred as IBM claims, which Plainitff disputes, the resultant behavior against Plaintiff was unjustified. Simply put, the punishment does not meet the alleged crime. Working with so many different customers, Plaintiff could not be 'everyone's sweetheart." (Ex 5 at 414-425) Even IBM admits in response to EEOC to a large number of customers and other IBM employees with whom Plaintiff worked (3V), which was true throughout Plaintiff's employment by IBM (3A).

While Plaintiff never refused to meet, other IBM employees have actually refused to meet alone and without adverse consequences, as documented in Plaintiff's deposition (Ex. 5 at 480-485) and Judd Sloan's deposition (Ex. 4A at 70-72).

IBM rushed to Plaintiff's home on October 13, 1994, to hand deliver a letter of termination while Plaintiff was at the EEOC filing a charge, placing it in Plaintiff's mailbox. WHAT WAS THE RUSH? Even though IBM had been told that Plaintiff was going to the EEOC that day, IBM had no reason to beat the official notice from the EEOC if IBM's claim of insubordination was truly valid. Sufficient evidence exists to cast doubt on the timing of IBM's action and the validity IBM's allegations against Plaintiff.

IBM's continued actions against Plaintiff after Plaintiff's termination indicate other intentions or motivations were at work than business reasons. Not only did Al Rodecap made erroneous, damaging remarks about Plaintiff, but IBM was already planning to charge Plaintiff of THEFT!

(Ex. 2Y) The items were, of course, returned (Ex. 2Z). Plaintiff also requested a sign-off signature when any items were returned to IBM.

Plaintiff was never paid the commissions which Plaintiff had earned (Ex. 2Z) although Plaintiff made demand for those monies. Neither did IBM pay Plaintiff's vacation pay. IBM' refusal to pay Plaintiff all monies already earned is evidence of further retaliating against Plaintiff.

7. **The True Decision Makers in Plaintiff's Termination of October 13, 1994, is Still in Dispute**

Al Wells, IBM Office of the Chairman of the Board, communicated with Bob LaBant's office, regarding Plaintiff's Open Door, with instructions to "copy this office on the final letter to the employee, the investigation report, the summary of the investigation, and the employee profile." Ex. 3B at DEF 200138). A copy of the Open Door Summary was also faxed to Al

Wells on October 6, 1994, before it was actually sent to Plaintiff (Ex. 3B).

Lisa Landry's Condition of Employment letter dated May 16, 1994 (Ex. 2M), two (2) years and one (1) day after the filing of Plaintiff's EEOC charge on May 15, 1992, was actually drafted by Cathe Moran (Ex. 3C). Input from Steve Ramos was forwarded by Lisa Landry to Cathe Moran as well as Gail Walker Jarrett (Ex. 3D). Even after Plaintiff was terminated by IBM, Steve Ramos was still providing input by asking Al Rodecap (Ex. 3J) to "document" allegations against Plaintiff, raising the question of just how many times he provided negative information about Plaintiff, either directly or indirectly, upon which Lisa Landry and Gail Walker Jarrett acted.

Susan M. Whitney, VP and General Manager, forwarded documents to Joan Hauser and IBM legal on May 24, 1994 (3E), information that Plaintiff had

marked "Personal and Confidential," but did not forward Plaintiff's request to the next level as requested by Plaintiff.

Al Wells forwarded a copy of his e-mail of October 6, 1994, to Plaintiff to Steve Kelley (Ex. 3G).

Mike Heneghan forwarded the e-mail of May 2, 1994, from Steve Ramos to Gail Walker Jarrett who forwarded it to Bill Noah and Cathe Moran "for their guidance" on May 2, 1994 (3H).

IBM has opposed Plaintiff's request to depose Louis V. Gerstner, Jr., claiming that he knows nothing about the case. But, IBM is basing its argument on the current Open Door policy, not the previous policy. Plaintiff's case is based upon the policy in force in 1994, not the updated policy of 1995. But, then, Al Wells would have known and should have revealed it. Based upon the Open Door policy in force at the time of Plaintiff's employment by IBM, Plaintiff acted on the promises and

protection of that policy. Plaintiff appealed to the IBM Chairman and Chief Executive Officer who is ultimately responsible for any violations of federal law committed by IBM. Plaintiff holds the IBM company responsible for the actions against Plaintiff.

IBM distorts Plaintiff's testimony in that Plaintiff can only speculate as to the true decision maker (s). Sufficient evidence exists even in the limited discovery material IBM sent Plaintiff that Lisa Landry and Gail Walker Jarrett were not acting alone. Until the ultimate decision maker is revealed, it is only speculaton. Plaintiff is still willing to travel to the location of Louis V. Gerstner, Jr., as Plaintiff offered to do while at IBM (Ex. 3F).

Identity of true decision makers in itself could be all sufficient to establish claims against IBM.

A review of Lisa Landry e-mail to Gail Walker Jarrett with the subject of "Wenzel" indicates that Lisa was

getting negative input from both Steve Zaudtke and Steve Ramos. While Lois Baptiste was also mentioned, Plaintiff has preserved voicemail message from her in the cassette tapes submitted *In Camera* to the Court for evaluation as to her manner and tone of voice as well as Plaintiff's responses to her.

8. Plaintiff's Age Was a Motivating or Contributing Factor in Plaintiff's Termination

Plaintiff does not have to prove a prima facie case of age discrimination, only that age was a motivating or contributing factor in this mixed-motive case.

While Lisa Landry and Gail Walker Jarrett state in their affidavits that they did not seek to replace Plaintiff, it would be logical from the plethora of IBM attorneys involved, per IBM's privilege logs, that IBM would not replace Plaintiff or, not obviously, to assist Plaintiff in establishing a prima facie case. However, after Plaintiff's termination IBM did attempt to replace

Plaintiff with males (younger?) on a contract that the City of Indianapolis/Marion County signed with IBM specifically for Plaintiff's skills (Ex. 3I), as stated in the depositions of Rick Copple (Ex. 3Z at 32) and Kenneth Stephens (Ex. 3Y at 12-12). Additionally, in discovery documents from IBM, Plaintiff discovered that Steve Ramos had asked Al Rodecap to document by sending to Gail Walker Jarrett (Ex. 3J). Not only does it provide evidence of IBM's attempt to turn Plaintiff's work over to a (younger?) male, but it calls into question the motivations of Gail Walker Jarrett, Steve Ramos, and now Al Rodecap towards Plaintiff. At that time Plaintiff was no longer employed by IBM and Plaintiff was already employed by the City of Indianapolis/Marion County (Ex. 3K) yet Steve Ramos continued to involve himself in Plaintiff's life as well as Gail Walker Jarrett. Any claims that their actions were only motivated by good intentions for the customer are

laughable because they, then, would not have terminated Plaintiff who was sought by this important IBM customer. Furthermore, Plaintiff disputes Al Rodecap's narrative, especially since it does not even indicate that Steve Tang, an employee of the City of Indianapolis/Marion County was present during the entire conversation which Al Rodecap alleges occurred with Plaintiff! Plaintiff has conferred with both Kenny Stephens and Steve Tang as to the content of Al Rodecap's narrative and the additional comments by Steve Ramos. Plaintiff has already stated that Kenneth Stephens will be a witness on Plaintiff's behalf at the trial (Ex. 3L) and Kenneth Stephens is willing to make a statement at trial as to his recollection. Accordingly, Steve Tang who is now employed out of state is willing to come forward and give a statement when he travels locally to Indianapolis, Indiana. Plaintiff and Steve Tang are in the process of working out the logistics and

Plaintiff may have to travel to his location to take a statement.

Testimony by retired male IBM employees, Doyle Kincaid and Bobby Clayton that they did not experience age discrimination only serves on substantiate Plaintiff's claims of disparate treatment. Bobby Clayton testified that he had to sign an agreement not to sue IBM (Ex. 4C at 76). While Plaintiff does not have a copy of the agreements signed by both males, it would be most probable that they had to sign the same release that Plaintiff did not sign, especially since that form states that "All employees are required to sign this release." (Ex. 3M at DEF 300763) but, if not, Plaintiff was treated differently, another indication of disparate treatment. That release also states that "You also agree that this Release covers, but is not limited to claims arising from the Age Discrimination in Employment Act of 1967, as amended,...and any other federal, state or

local law dealing with discrimination in employment, including, but not limited to, discrimination based on ...age." (Ex. 3M at DEF 300765). This type of language suggests, if not provide proof, that age discrimination was part of the IBM's corporate environment.

IBM failed to notify Plaintiff of required PRP/Vested Rights paperwork. Plaintiff thought Plaintiff has lost all retirement benefits until receiving the letter from Lynn Rossman, Retirement/Transition, on March 31. 1995 (Ex. 3N). Even so, the letter also states that the monies will be available to Plaintiff at age 62, rather than at age 55, as would have been true if Plaintiff had taken the Retirement Bridge Leave of Absence (Ex. 3O).

While it was not required that Plaintiff take the Retirement Bridge Leave of Absence once Plaintiff qualified, every month past qualification would have added to retirement benefits. As explained to Plaintiff,

once a person reached full retirement status, benefits could not be taken away, only the amount that a person got in payments could be affected in that the calculations for retirement payments were made on the salary average of the last years of employment. An understanding of how retirement payments were calculated makes questions asked by IBM's counsel of Doyle Kincaid in his deposition of February 13, 1998 (Ex. x-x), meaningless. Doyle Kincaid, a male, had reached full retirement status. Even so, although Bobby Clayton, a male, had not reached full retirement status, he was not "laid off" by his manager, Steve Zaudtke (Ex,

4C at 52-52), until he had qualified for the Retirement Bridge Leave of Absence (Ex. 4C at 51-52, 76-77) which he then took.

Additionally, by terminating Plaintiff just prior to the Retirement Bridge Leave of Absence, IBM kept Plaintiff

from getting the continuation of employee medical benefits, which Plaintiff needed due to pre-existing medical conditions. Plaintiff even had surgery scheduled the very next week but Plaintiff was not even notified of Plaintiff's COBRA rights, as documented in Plaintiff's note of November 18, 1994, to Gail Walker Jarrett, and the deposition of Rick Copple (Ex. x). While Gail Walker Jarrett later claimed she did not know of Plaintiff's scheduled surgery, she did.

Plaintiff disputes that Plaintiff was not eligible for the Retirement Bridge Leave of Absence. In fact, both Lisa Landry and Gail Walker Jarrett in their affidavits admit to Plaintiff's upcoming qualification. Plaintiff even claims that Plaintiff, technically, had already met the time requirements for the bridge when Plaintiff was terminated on October 13, 1994, just prior to Plaintiff's 50th birthday in January, 1995. Due to the enormous amount of overtime (1,288 hours) worked by Plaintiff in

1994 alone (Ex. 2U), Plaintiff easily qualified! When Plaintiff worked for Mike Heneghan, he had estimated that Plaintiff worked 20% more hours in overtime. While IBM could easily calculate from employee timecard records that included reported overtime the existence of a far greater percentage over the 10-1/2 years of Plaintiff's employment at IBM, Plaintiff's contribution to IBM at an estimate prior to 1994 of 20% is laudable and deserving of proper compensation. Depriving Plaintiff of earned benefits smacks of retaliation. Any claims by Gail Walker Jarrett and Lisa Landry as to lack of knowledge of Plaintiff's upcoming qualification is a weak defense, indeed. Gail Walker Jarrett had not so long ago been in Personnel, prior to her role as PDM Manager. Furthermore, as stated in Plaintiff's deposition (Ex. x), IBM never investigated Plaintiff's claims of age discrimination. Although Plaintiff appealed to Louis V. Gerstner, Jr., to

investigate local actions being taken against Plaintiff and other IBM employees as to age discrimination (Ex. 1A at 2-3), and although Plaintiff was told by Al Wells that it would be investigated (Ex. 2T), he allowed Plaintiff to be terminated without conducting an investigation on Plaintiff's behalf.

9. **Issues of Material Fact Exist That Cannot be Resolved Without Observation of the Demeanor of the Witnesses in Order to Evaluate Their Credibility**

Gail Walker Jarrett stated that she had not known of Plaintiff's upcoming surgery (Ex. 3P) in response to Plaintiff's note of November 14, 1994 (Ex. 3P). Indeed, Plaintiff was to have begun medical leave the very week of Plaintiff's termination for surgery scheduled the next week, actually the day after Plaintiff's termination! Yet, Gail Walker Jarrett stated in her letter of termination dated October 13, 1994 (Ex. 3M at DEF 300762) that Plaintiff was to return all medical cards "immediately."

But, Gail Walker Jarrett did know, as documented in the fax sent to Cathe Moran on October 12, 1994 (Ex. 3Q). In the cassette tapes Plaintiff submitted *In Camera* to the Court on January 20, 1998, exists a copy of that voicemail sent by Plaintiff to Steve Zaudtke so further validation that Gail Walker Jarrett did hear Plaintiff's message can be done by a comparison of Gail Walker Jarrett's note to the actual message. Gail Walker Jarrett's credibility is disputed by her own records. Likewise, Gail Walker Jarrett allowed Mike Heneghan to place negative comments on Plaintiff's evaluation related to billing even though Plaintiff was highly utilized and non-billable had an equal priority to billable in both 1993 and 1994, as documented in a e-mail sent by Gail Walker Jarrett (Ex. 3R)

Lisa Landry claimed she did not know about Plaintiff's Open Door when she met with Plaintiff on May 20, 1994 (Ex. 3S) but she did, as evidenced in her

comments in her log (Ex. 2E at DEF 100203). Lisa Landry's credibility is disputed by her own records. Plaintiff disputes Judy Battista's accounting of the facts. Plaintiff did not threaten Judy Battista.

In IBM's brief it is alleged that Plaintiff threatened Judy Battista with comments such as "I know where you live" and "I know you have children." While Judy Battista's affidavit does not state the comment of "I know you have children, " Plaintiff disputes either comment. Plaintiff did not know then where Judy Battista lives, Plaintiff does not know now, nor does Plaintiff care. Moreover, Plaintiff's transcription of Plaintiff's PageNet pager (Ex. 2N at #1) shows the number of 464-3244, the number given for Judy Battista on the IBM phone list (3T) and on the fax cover when Plaintiff was faxed a copy of the Arvin contract (Ex. 3T). The term "duplicate' (Ex. 2N at #1) meant that exact number had been entered on that pager at least

once before. This confirms Plaintiff's account that Judy responded to Plaintiff's call by paging Plaintiff, then paging Plaintiff again later. Now, the question must be asked – if Judy Battista was "frightened,' as stated in her affidavit, why did she call back again? Not only that, Judy Battista even called Plaintiff again and left a voicemail for Plaintiff after she had talked with Mike Heneghan, as she had promised she would do so that Plaintiff would know if Plaintiff got a conflicting account from Mike Heneghan, which Plaintiff did get. Voicemail messages from both Mike Heneghan and Judy Battista are preserved on the cassette tapes submitted *In Camera* to the Court. Plaintiff also found notes of Mike Heneghan as to his phone call (Ex. 3U) which can best be evaluated with the actual message as to the tone of voice he used in threatening Plaintiff. Likewise, Judy Battista's motivations appear less than "pure" and not wholly related to business reasons. As

Bob Clayton stated in his deposition, negative comments from IBM employees are questionable (Ex. 4C at 27), that "You always had people complaining..."

Judy Battista told Plaintiff that she had first heard comments not from Marcy Bradley but from Cathy Jones (IBM employee), that she had then contacted Marcy, that she had talked with her husband, Roger Battista (Plaintiff's IBM manager in 1991) who told her to talk to Roxanne Stewart (Judy's manager), who, in turn, told her to go to Mike Heneghan! At no time in this sequence of events did Judy Battista actually talk with Plaintiff and she was vague as to when she had actually talked with Mike Heneghan.

Plaintiff told Judy that she never thought Judy would do something like this to her although Judy had the reputation of "runni ıg' to the managers when both Judy and Plaintiff were in the Insurance Unit reporting to Deb Stoll, IBM manager. Judy insisted on justifying her

actions in one situation when she "ran" to Deb Stoll complaining about Ruby Scott-Newton. Judy claimed that she was frustrated because the customer was complaining to her about Ruby but Deb Stoll would not do anything. But, when Ruby went to the customer to verify Judy's "story," she learned that the customer had complained about IBM support, not Ruby specifically. Plaintiff has both Ruby Scott-Newton and Roger Battista on the list of IBM employees to depose. Ruby Scott-Newton once told Plaintiff that she had overheard Roger Battista trying, in vain, to get David Maultsby to admit to having problems working with Plaintiff, which David Maultsby denied. What Ruby told Plaintiff was quoted almost verbatim as to what David Maultsby had told Plaintiff. When David Maultby warned Plaintiff, he told Plaintiff he had told Roger that he did not know what Roger was trying to do but he wanted no part of it. Plaintiff reported David Maultsby's warning to Chuck

Giarratana, IBM Commercial Branch Manager. Later, Plaintiff was told by Ruby Scott-Newton that Roger was trying to get both her ranking and Plaintiff's ranking lowered. As best Plaintiff can recollect, Ruby went to Gail Walker Jarrett and got the action against her stopped.

Sufficient evidence exists to suggest that other motives and intentions were involved in Judy Battista's actions in the alleged complaints that IBM used against Plaintiff. Both times the alleged complaints were passed on by Judy Battista. IBM admits that Marcy Bradley did not call IBM directly which raises the question of how serious the alleged complaint really was. After all, Marcy had been quite candid in her remarks to Plaintiff that her manager did not like the idea of having to pay IBM. Marcy Bradley indicated in her discussion with Plaintiff that she had been contacted by IBM. While IBM alleges that Marcy was scared for her safety, it

seems strange that, if true, she waited two (2) weeks to say anything. Marcy Bradley is listed as a witness for trial where she can speak under oath. With such conflicting statements and the fact that Marcy Bradley had told Plaintiff she would be willing to speak to someone on Plaintiff's behalf, the fact that she told Plaintiff that she would not say anyting and keep it to herself while Plaintiff got someone to call her, as related in Plaintiff's deposition (Ex. 4 at 422-426).

An undated note found in Mike Heneghan's files during discovery suggests that his call to Marcy Bradley was made under false pretenses. Comments like "Perf Review...Judy Battista I got ...name as someone I can talk to. Do you have a couple minutes?...Trying to Inquire on Service Delivery..." (Ex. 2G) do not suggest that Mike Heneghan was responding to a customer complaint.

The affidavit of Al Wells explains an Open Door process at IBM. Since the Open Door process is a vital part of Plaintiff's claims, Plaintiff disputes the description in that affidavit. IBM documents submitted to the EEOC include a copy of two (2) different Open Door procedures. One of those procedures (Ex. W), the one which Al Wells describes in his affidavit, is dated 1995 while the other procedure (Ex. 3X) is the one understood by Judd Sloan (Ex. 4A at 52-54), Doyle Kincaid (Ex. 4B at 25-26, 65-66) and Bobby Clayton (Ex. 4C at 19-20), a retired IBM manager. That procedure indicates in #1-b-8 that "In the case of the Open Door Investigations assigned by the IBM chief executive office, the individual will also be told that the findings will be reviewed by the CEO and a written decision forthcoming." (Ex. 3X at DEF 400216)

10. Issues of Material Fact Exist That Cannot be Resolved Without Physical Evidence

Plaintiff submitted evidence *In Camera* to the Court on January 20, 1998. Those cassette tapes are copies of voicemail recordings which Plaintiff intends to use at trial. Plaintiff has requested that one of the messages be protected from the public record and Plaintiff is awaiting a decision from the Court. All issues of material fact cannot be resolved without a jury hearing those tapes to evaluate the credibility of witnesses by the tone of voice and inflection as well as content, refuting the accounting of facts as submitted by IBM in its motion for summary judgment.

All issues of material fact cannot be resolved without observing a difference in the size of Marcy Bradley and Plaintiff, requiring physical evidence to evaluate the credibility of IBM's allegations that Marcy Bradley feared physical harm from Plaintiff.

11. Issues of Material Fact Exist That Cannot be Resolved Without Discovery

IBM still has not complied with Plaintiff's discovery requests by providing all documents in IBM's possession, and motions are currently pending in this Court. Even with the documents Plaintiff has received, Plaintiff has discovered pages missing from log files. Plaintiff must file motions related to recent objections submitted by IBM, objections submitted by IBM even after IBM filed its motion for summary judgment. IBM has filed numerous motions for extensions during this case, delaying the submission of some documents until just prior to filing its motion for summary judgment. Sufficient evidence exists that further review of those documents will produce additional inconsistencies in IBM's accounting of facts as submitted in IBM's motion for summary judgment. Sufficient evidence exists that further discovery by Plaintiff is needed before all genuine issues of fact can be resolved.

12. **Issues of Material Fact Exist That Prevent Even a Partial Granting of Summary Judgment**

Plaintiff's claims against IBM rest on facts so intertwined that Plaintiff must be believed as to the true accounting of all facts. Plaintiff's dispute of the accounting of facts as submitted in IBM's motion for summary judgment cannot be resolved without an evaluation of the credibility of all witnesses where the accounting of facts rests solely on verbal discussions. If Plaintiff is believed, all claims against IBM stand for trial. Since IBM so vehemently resisted all efforts by Plaintiff to avoid verbal discussions where it would later be Plaintiff's word against IBM's accounting of those verbal discussions, even punishing Plaintiff for seeking the truth and/or for seeking to keep the record clear, credibility must be evaluated by observations of those witnesses. Evidence viewed in the light most favorable to Plaintiff requires a trial because a juror, not a judge,

is better suited to fit the bits and pieces of evidence together. In Gallagher v. Delaney, Hansen & Con Edison, (1998 WL 119614 (2nd Cir. (N.Y.), the U.S. Court of Appeals for the Second Circuit evaluated both theories of sexual harassment, *quid pro quo* and the hostile work environment, determining that a reasonable juror might disagree with the district court's determination.

AFFIRMATION OF PLAINTIFF

I am the Plaintiff, Sandra M. Wenzel, a *Pro Se* litigant in the above-captioned case. I am a competent adult of sound mind and have personal knowledge of the facts and information set forth in this answer brief. I do affirm that I believe all of the statements to be, to the best of my personal knowledge, true and correct.

Signed this 2nd day of April, 1998.

/S/ Sandra M. Wenzel

Sandra M. Wenzel
Pro Se
624 Marana Drive
Carmel, IN 46032
(317) 846-7659

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served this 2nd day of April, 1998, to Attorneys for Defendant:

Michael A. Moffatt
Susan M. Zoeller
Barnes & Thornburg
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, IN 46204

/S/ Sandra M. Wenzel

Sandra M. Wenzel
Pro Se
624 Marana Drive
Carmel, IN 46032
(317) 846-7659

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Sandra M. Wenzel,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. IP96-1704-C-T/G
	)	
International Business	)	
Machines Corporation	)	
	)	
Defendant	)	

COMPLAINT

I. PARTIES

The names and addresses of each plaintiff and defendant are the following:

A. Plaintiff

Name: Sandra M. Wenzel
Address: 624 Marana Drive
Carmel, IN 46032

B. Defendant

Name: International Business
Machines Corporation

Address: One IBM Plaza
Chicago, IL 60611

II. STATEMENT OF JURISDICTION AND VENUE

Jurisdiction over this action exists in the United States District Court of the Southern District of Indiana because of the following:

(1) This action is brought to remedy discrimination on the basis of sex and age in the terms, conditions and privileges of employment and to remedy retaliation against an employee for activity protected under Title VII all in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* ("Title VII"), and of the Age Discrimination in Employment Act, as amended, 29 U.S.C. section 621 *et seq.* ("ADEA").

(2) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343(4), 42 U.S.C. Section 2000e-5 and 29 U.S.C. Section 626(c). Injunctive and declaratory

relief, damages and other appropriate legal and equitable relief are sought pursuant to 42 U.S.C. Section 2000-5(f) and (g) and 29 U.S.C. Section 626(b).

(3) Plaintiff filed a charge of discrimination on the basis of retaliation, age and sex, as amended, against defendant with the Equal Employment Opportunity Commission ("EEOC") on October 13, 1994, with amendments on October 17, 1994 and May 17, 1995.

(4) On August 28, 1996, plaintiff received notification from the EEOC of her right to institute this action by issuance of a "Notice of Right to Sue" (See attached) on her charge. Plaintiff has complied fully with all administrative prerequisites under Title VII and ADEA.

(5) Venue is proper within this District because the unlawful practices complained of herein occurred within the Southern District of Indiana.

III. CAUSE OF ACTION

Ground 1: Defendant has discriminated against plaintiff in the terms of and conditions of her employment on the basis of her sex in violation of Title VII. Plaintiff is now suffering and will continue to suffer irreparable injury and monetary damages as a result of defendant's discriminatory practices unless and until this Court grants relief.

Ground 2: Defendant has retaliated against plaintiff on the basis of her having complained of discrimination and retaliation, in violation of Title VII. Defendant violated its own internal procedure, the Open Door process, for resolving complaints, including but not limited to, denying plaintiff's repeated requests for protection, ignoring plaintiff's complaints about retaliation from her having complained about retaliation and discrimination, ignoring plaintiff's complaints about retaliation from a previous charge filed with the EEOC, failing to thoroughly and responsibly investigate plaintiff's complaints, breaching

confidentiality, and even threatening plaintiff against use of the Open Door process. As a result of defendant's conduct, plaintiff has suffered damages, including but not limited to emotional distress and loss of reputation.

Ground 3: Defendant has retaliated against plaintiff on the basis of her having filed charge(s) with the EEOC, in violation of Title VII. Plaintiff is now suffering and will continue to suffer irreparable injury and monetary damages as a result of defendant's retaliatory practices unless and until this Court grants relief.

Ground 4: Defendant, by its conduct, including but not limited to, terminating plaintiff on the very day plaintiff filed the EEOC charge by placing a hand-delivered letter of termination in her home mailbox in spite of the fact that defendant had been made aware plaintiff had gone to file an EEOC charge, terminating plaintiff in spite of the fact that defendant had been made aware that plaintiff had surgery scheduled the following week yet failing to notify plaintiff of

her rights under C.O.B.R.A. to proceed with surgery, terminating plaintiff in spite of the fact that defendant had been made aware of plaintiff's overtime schedule due to upcoming surgery and the inability of meeting with her manager that week due to her manager being on vacation and out of the office, and terminating plaintiff in spite of the fact that she was in the process of fulfilling two (2) client contracts signed specifically for her consulting services, caused plaintiff to suffer severe mental anguish. As a result of defendant's conduct in violating Title VII rights, plaintiff has suffered damages, including but not limited to monetary damages, mental anguish and humiliation.

Ground 5: Defendant, by its conduct, including but not limited to, failing to thoroughly and responsibly investigate her claim of age discrimination, terminating plaintiff in October, 1994, just prior to her eligibility for the Retirement Bridge Leave of Absence in January, 1995, and failing to

notify plaintiff of the requirement to submit PRP/Vested Rights paperwork has discriminated against plaintiff in the terms of and conditions of her employment on the basis of her age in violation of the ADEA. Plaintiff is now suffering and will continue to suffer irreparable injury and monetary damages as a result of defendant's discriminatory practices unless and until this Court grants relief.

IV. STATEMENT OF FACTS

(1) Plaintiff was hired as a Systems Engineer in Information Systems Services, Indianapolis, IN, on April 10, 1984, and worked on local, national, and international contracts.

(2) While working on a federal government contract at Ft. Benjamin Harrison ("Ft. Ben"), plaintiff experienced harassment in 1988 and 1989 from three (3) male peers: Brian Stone ("Stone"), Ron Moore ("Moore"), and Ellis Holman ("Holman"). Plaintiff reported the ill treatment and "hostile environment" to management, documented it in a memo, and the actions were abated for a

period of time until plaintiff got a new manager, Tom Boehrer ("Boehrer"). When the behavior continued even though plaintiff notified Boehrer, plaintiff sent a letter to Chris Downall ("Downall"), Branch Manager, requesting that she investigate the matter. Instead, Downall had personnel, Barbara Dorsey ("Dorsey"), investigate. Dorsey told plaintiff her investigation found plaintiff was telling the truth. Yet, Moore was promoted during the time of investigation and Stone and Holman later received promotions before plaintiff's next promotion even though plaintiff billed the most contract hours for the Branch in 1988 and would have done so in 1989 has she not been removed from the account and a younger male with less experience placed on the account. Plaintiff transferred to the Commercial Branch of U.S. Marketing & Services in 1990.

(3) In 1992 plaintiff's manager, Phil Canada ("Canada") negotiated a contract for plaintiff at the City of Indianapolis

& Marion County ("City-County") when the client specifically requested that plaintiff work on the contract. After Canada left the company, plaintiff's team was moved to Consulting Services Networking and plaintiff reported to the same manager, Carolyn Perry ("Perry"), as Stone. When peers reported derogatory remarks made about plaintiff by Stone and Stone interfered with the contract by making comments to the client about Canada and plaintiff, plaintiff reported it to Jeff Artis ("Artis"), Manager of Product Marketing and Technical Support. Plaintiff told Artis she was leery about being assigned to Consulting Services and working with Stone, one of the same males who had harassed her. Plaintiff wanted Artis to be aware because she did not believe that Perry would protect her if Stone continued to interfere with the contract and plaintiff has always felt that, at some point defendant would try to take some form of retaliatory action against her, as had been done to others in similar situations. Later, plaintiff reported

Stone's remarks and behavior to Perry. Shortly thereafter, Perry informed plaintiff on May 11, 1992, that she was on the surplus list. When it was announced on May 14, 1992 by Mike Wiley ("Wiley"), General Manager of Indiana, that Downall (same manager who allowed the harassment in 1988 and 1989), was being assigned as the new Manager of Consulting Services, plaintiff filed with the EEOC on May 15, 1992.

(4) While plaintiff was out of town attending a class in June, 1992, she was contacted by Gail Walker ("Walker"), personnel, that she was no longer on the surplus list, that she was being given a salary increase, and that her team was going to be moved to another manager. When plaintiff returned to the office, she learned that quite a few women had also been removed from the surplus list. As notified by Walker, plaintiff's team was moved back to Product Marketing and Technical Support, reporting to Terry Schackow ("Schackow"). Plaintiff received a very good

performance appraisal and Schackow sought leadership opportunities for her. Plaintiff received a Technical Excellence Award in 1993.

(5) On or about May, 1993, plaintiff was contacted by David Tite ("Tite"), EEOC investigator, to sign off on her EEOC charge. Plaintiff was led to believe that she had to do so, per the EEOC director, because the charge had been open for a year. Plaintiff voiced to Tite on more than one occasion her fear of retaliation once the charge was closed because defendant's management could not have treated her any nicer during the time the charge had been waiting for investigation. Tite did not feel that anyone would bother plaintiff again but he told plaintiff to contact Drew Terry ("Terry"), defendant's attorney, should anything happen again.

(6) It was not long before plaintiff detected a marked change in manner and attitude towards her by some of defendant's management. Most marked in plaintiff's

perception was the change in Walker who was now the manager of plaintiff's Professional Development Manager (PDM), Mike Heneghan ("Heneghan"). Thus began a series of events and actions that seemed in plaintiff's mind to be geared at creating a most "hostile environment" where plaintiff would feel unwelcome and unwanted; one peer later stated he did not know why things were happening to her but he felt that plaintiff was being "picked on." When a big "fuss" was being made over Advantis connect charges, plaintiff sought Heneghan's assistance in vain. When plaintiff met with Steve Zaudtke ("Zaudtke") on or about August 30, 1993, she voiced her concerns about the attitude towards women in Customer Service based upon his own manner and comments to her. Later, plaintiff contacted Terry, attorney, via e-mail (PROFs) on September 15, 1993, and he put her in touch with first Bill Noah ("Noah"), Human Resource Advisor, and then Steve Kelley ("Kelley"), defendant's attorney. But, no real investigation was done

regarding the untrue remarks about plaintiff's Advantis charges and plaintiff later learned upon her own investigation that the charges had been incorrectly billed; plaintiff forwarded this information to all involved parties but none of them acknowledged that plaintiff has been falsely accused. When plaintiff met with Wiley, now Area 5 Vice President, in December, 1993, she voiced her concerns about retaliation for filing with the EEOC and the "hostile environment" since she had signed off on her charge. Wiley was very rude to plaintiff and dismissed her concerns by saying that hardly anyone at the local office knew about it. Plaintiff tried to explain that it would not matter if only a few people knew if those people were in a position of power to retaliate against her. Of special concern to plaintiff at that time were Wiley and Walker.

(7) During this time plaintiff also voiced her concerns to defendant's management about, including but not limited to, attempts to remove her from successful client environments,

assignments for which plaintiff was qualified being given to men, existing responsibilities being removed and given to men, and lack of local contract opportunities. During this time plaintiff was also seeking resolution via the Open Door process without success.

(8) When Zaudtke announced the new Business Leader/PDM alignment on March 1, 1994, Lisa Landry ("Landry") became plaintiff's Professional Development Manager (PDM). But, it was not until on or about April 12, 1994, that a PDM Breakfast was held where Landry introduced herself to plaintiff. Landry also told plaintiff that a male peer, Bennett Moss ("Moss"), had requested that plaintiff mentor him and plaintiff agreed to do so.

(9) On April 27, 1994, Heneghan reviewed plaintiff's evaluation with her but it has inaccurate statements as well as information that should have been conveyed to plaintiff prior to an evaluation. When plaintiff inquired as to why Heneghan had not contacted her to hear her accounting of

events, he had no valid explanation. When plaintiff told Heneghan that she would follow up on some of the remarks he claimed others had made, he made no objection. Plaintiff later restated what she had said and his lack of objection via phonemail and e-mail. Plaintiff also learned that Heneghan had misstated what he told plaintiff. Heneghan also included events that had occurred outside the scope of the evaluation at which time he was no longer plaintiff's manager.

(10) In following up with Steve Ramos ("Ramos"), Business Leader, plaintiff inquired as to why he had not protected her from the abusive manner and demeaning remarks made to plaintiff by Bob Simp ("Simp") and the remarks made about plaintiff by Simp to her teammates, as plaintiff has requested more than once, but, instead wentto Heneghan and complained about plaintiff so that something would be put on her evaluation. Ramos indicated that he did it to keep a "black mark" out of his personnel file. Ramos told plaintiff

that he had gone to Zaudtke, his manager, who told him to go to Heneghan. Plaintiff voiced her concern that Ramos and Zaudtke deliberately had some critical remarks put on her evaluation; Heneghan was no longer plaintiff's manager but still had not done the evaluation. Plaintiff began in earnest to seek resolution via an Open Door investigation outside the area but all efforts seemed stymied.

(11)Plaintiff also sought the assistance of her new manager, Landry, but she refused. Landry appeared to already know about the situation but she denied it. Plaintiff was told Landry was not really her manager until plaintiff signed the evaluation. Plaintiff inquired as to why would she want to sign an inaccurate evaluation; plaintiff felt it might be used against her in the future. When plaintiff told Landry she would attempt to resolve the matter via an Open Door, Landry told plaintiff she might want to think about what she was doing to herself by using the Open Door process.

(12) On May 16, 1994, two (2) years and one (1) day since

the filing of plaintiff's EEOC charge, Landry contacted plaintiff via pager while she was working on a critical contract situation and demanded that plaintiff come to the office, also stating that Landry would consider plaintiff's behavior insubordinate if she was not there at a specified time. Plaintiff's attempts to reach Landry via phone to explain the client's situation and that the client's location on the northeast side prevented plaintiff from meeting Landry in the office at the demanded time went unheeded for a long time. Finally, Landry responded and another time was scheduled. Later, plaintiff learned that Landry had "turned off" the backup hardcopy of those pager messages but plaintiff transcribed those pager messages for future documentation. Prior to the meeting with Landry, plaintiff sent a PROFs note to Walker (now Gail Walker Jarrett), requesting a different manager. That request was later denied so plaintiff repeated the request and that, if denied, to send plaintiff a Request for Transfer (RFT) form; the

request was refused and the RFT form was never sent by Walker.

(13) When plaintiff met with Landry on May 20, 1994, Landry presented her with a Condition of Employment letter but refused to tell plaintiff the reason for the letter. Landry told plaintiff no one wanted to work with her. When plaintiff asked Landry who were her accusers, what were their names, Landry told her nothing. When Landry demanded that plaintiff sign the letter, plaintiff told Landry she could not sign the letter without seeking legal counsel. Plaintiff was shocked when Landry mentioned severance pay and inquired as to what had she done that was so terrible. Plaintiff did seek legal counsel and the letter was never signed. Plaintiff later learned of the availability of the Retirement Bridge Leave of Absence and that plaintiff would become eligible on her 50th birthday in January, 1995. Plaintiff felt the letter was a pretext to deny her this retirement benefit.

(14) Plaintiff continued to seek protection from Landry and Walker via the Open Door process but her pleas went unheeded. Plaintiff sought protection from any further damage by requesting a witness be present at any meeting with them but her repeated requests continued to be refused. Plaintiff requested assistance from Kelley but he did nothing. Plaintiff's correspondence with Kelly indicates that plaintiff had not refused to meet but there were extenuating circumstances. Kelly was told by plaintiff of her upcoming surgery.

(15) Plaintiff had even appealed her Open Door to Louis V. Gerstner, Jr. ("Gerstner"), Chairman of the Board and Chief Executive Officer, and stated the additional concern of age discrimination that needed to be investigated. Just prior to plaintiff's termination, plaintiff has talked again with Al Wells ("Wells") in Gerstner's office. Wells was made aware of plaintiff's upcoming surgery. On the day after her termination plaintiff sent a letter to Gerstner via fax but the

termination was not rescinded.

V. RELIEF

WHEREFORE, plaintiff respectfully requests that this Court enter a judgment:

(1) declaring that the acts and practices complained of herein are in violation of Title VII and the ADEA;

(2) enjoining and permanently restraining these violations of Title VII and the ADEA;

(3) directing defendant to take such affirmative steps as are necessary to ensure that the effects of these unlawful employment practices are eliminated and do not affect plaintiff's contractual relations;

(4) directing defendant to place plaintiff in the position she would have occupied but for defendant's discriminatory and retaliatory treatment of her, and make her whole for all earning she would have received but for defendant's discriminatory and retaliatory treatment, including but not limited to, wages, bonuses, commissions, pension

and other lost benefits;

(5) directing defendant to pay plaintiff compensatory and punitive damages for the injuries suffered as a result of defendant's violations of Title VII;

(6) directing defendant to pay plaintiff monies owed with respect to unpaid vacation compensation;

(7) directing defendant to pay plaintiff compensatory damages and punitive damages for her mental anguish and humiliation;

(8) awarding plaintiff the costs of this action, together with reasonable attorneys' fees, as provided by 29 U.S.C. Section 626(b) and as provided by 42 U.S.C. Section 2000e-5(k); and

(9) granting such other and further relief as this Court deems necessary and proper.

DEMAND FOR A TRIAL BY JURY

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff demands a trial by jury in this action.

AFFIRMATION OF PLAINTIFF

I, the plaintiff in the aforementioned cause, do affirm that I have read all of the statements contained in the complaint and that I believe them to be, to the best of my personal knowledge, true and correct.

Signed this 24th day of November, 1996.

/S/ Sandra M. Wenzel